No. 97-288-CFX

Title: Vicky Lewis, et vir, Individually, as Parents, as Next Friends and as Administrators of the Estate of Kathryn C. Lewis, Deceased, Petitioners
v.
Brunswick Corporation

Docketed:
August 14, 1997

Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Aug 13 1997	Petition for writ of certiorari filed. (Response due October 15, 1997)
	Sep 8 1997	Order extending time to file response to petition until October 15, 1997.
	Oct 15 1997	Brief of respondent Brunswick Corporation in opposition filed.
	Oct 29 1997	DISTRIBUTED. November 14, 1997
	Nov 14 1997	Petition GRANTED. The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 29, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 28, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 18, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 2, 1998. **********
	Dec 24 1997	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Dec 29 1997	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Dec 29 1997	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Dec 29 1997	Brief amicus curiae of United States filed.
	Dec 29 1997	LODGING consisting of four copies of correspondence from the State of Alabama and U.S. Coast Guard, submitted by the Solicitor General.
	Dec 29 1997	Brief of petitioners Vicky Lewis and Gary Lewis filed.
	Dec 29 1997	Joint appendix filed.
	Jan 5 1998	Record filed.
	Jan 14 1998	CIRCULATED.
	Jan 20 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 26 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 28 1998	Brief of respondent Brunswick Corporation filed.
	Jan 28 1998	Brief amicus curiae of General Motors Corporation filed.
	Jan 28 1998	Brief amicus curiae of Washington Legal Foundation filed.
	Jan 28 1998	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.

2 pp

No. 97-288-CFX

Entry	Date	Proceedings and Orders
	Feb 18 1998	Reply brief of petitioners Vicky Lewis and Gary Lewis filed.
	Mar 2 1998	ARGUED.

Supreme Court, U.S.
FILED

97 . 2 8 8 AUG 1 3 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID E. HUDSON
(*Counsel of Record*)
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT, P.C.
Suite 700 – SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65 pp

QUESTIONS PRESENTED

1. The Federal Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ("Boat Safety Act") has both an express pre-emption clause and an express "savings clause" in respect to state authority. In light of recent Supreme Court holdings on pre-emption, is it constitutionally permissible to *imply* the federal pre-emption of state common law claims into the Boat Safety Act when that act *expressly* provides a reliable indicium of congressional intent with respect to state authority, and when no federal agency has issued an applicable pre-emptive "regulation" as *expressly required* by the Act?

2. The Boat Safety Act provides that "(c)ompliance with (the Act) does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g). Was it error to hold that torts of *omission* are impliedly pre-empted under the Boat Safety Act while torts of *commission* are simultaneously expressly saved from pre-emption, when such a differentiation between types of torts is not made in the Boat Safety Act's pre-emption or "savings" clauses?

PARTIES TO PROCEEDINGS

To the best of Petitioners' knowledge, the caption contains all of the parties to this action.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS IN THE CASE 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

1. Implied Pre-emption Analysis is Inapposite Under *Cipollone* and its Progeny 3

2. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Pre-emption under *Freightliner* 6

3. The Savings Clause Can Be Given Full Effect Under *Lohr* Without Implying Pre-emption ... 10

CONCLUSION 13

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES:

BFP v. Resolution Trust Corp., 511 U.S. ___, 128 L.Ed.2d 556 (1994) 5

California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 10

Chicago v. Environmental Defense Fund, 511 U.S. 328, 128 L.Ed.2d 302 (1994) 5

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3, 4, 6

CSX Transp., Inc. v. Easterwood, 507 U.S. ___, 123 L.Ed.2d 387 (1993) 3

FLRA v. U.S. Dept. of Navy, 966 F.2d 747 (3rd Cir. 1992) 7

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 3, 8, 9, 10, 13

In Re Ford Motor Co. Bronco II, 1995 WL 683854 (E.D. La. Nov. 13, 1995) 12

In Re Haas, 48 F.3d 1153 (11th Cir. 1995) 5

Keene Corp. v. United States, 508 U.S. 200, 124 L.Ed.2d 118 (1993) 5

Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997) 1, 3

Lewis v. Brunswick Corp., 922 F.Supp. 613 (S.D. Ga. 1996) 1

Lohr v. Medtronic, Inc., ___ U.S. ___, 135 L.Ed.2d 700 (1996) 3, 10, 13

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES RULES AND REGULATIONS:

44 Fed. Reg. 46849 (1979) 8

46 C.F.R. § 160 *et seq.* (1995) 7

Administrative Procedures Act, 5 U.S.C. §§ 551-559 ..... 1, 7

Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) 5

Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) 5

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) 5

Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ..... *passim*

Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* 8

OPINIONS IN THE CASE

1. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996). Civil Action No. CV 195-096. Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy).

2. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997). Appeal No. 96-8130. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997.

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The district court granted summary judgment against Petitioners on all counts on January 22, 1996. The Eleventh Circuit upheld the district court on March 21, 1997. The Eleventh Circuit denied rehearing on May 15, 1997, and this Petition was timely filed pursuant to Supreme Court Rule 13 within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and regulations are lengthy and are reprinted verbatim in the appendix pursuant to Supreme Court Rule 14.1(f). These provisions are 46 U.S.C. §§ 4302, 4306, 4311, and 5 U.S.C. § 553.

STATEMENT OF THE CASE

This case arises from the granting of Respondent Brunswick Corp.'s motion for summary judgment in the district court below. This motion was submitted upon stipulated facts prior to the initiation of discovery, to allow an efficient and "clean" determination of the threshold pre-emption issue which is the subject of this petition.

This civil action involves the death of Petitioners' 19 year old daughter. The Lewis' daughter was a passenger on a boat on Strom Thurmond Lake in Georgia. The boat was powered by a 75 horsepower outboard motor manufactured by Brunswick, which had exposed propeller blades and was operating without a protective guard, shroud or nozzle. During a turning maneuver, Petitioners' daughter was ejected from the boat and dragged into or struck by the rapidly rotating propeller blades of the outboard motor manufactured by Brunswick. She was pronounced dead at the scene, leaving no child or spouse. The coroner concluded that her death was caused by "chop wounds to (the) head and upper body."

Petitioners contend that Brunswick's failure to place a protective device on the propeller violates several Georgia common law duties, and filed an action based upon these state law claims in a Georgia state court. Brunswick removed this case to the United States District Court for the Southern District of Georgia due to the diversity of citizenship of the parties and the requisite amount in controversy. 28 U.S.C. § 1332(a)(1). Brunswick thereafter moved for summary judgment on the stipulated facts referenced above, asserting that the common law claims

brought by the Lewis Family are pre-empted by the Boat Safety Act. The district court granted Brunswick's motion for summary judgment on all counts, and Petitioners appealed to the Eleventh Circuit Court of Appeals. 28 U.S.C. §§ 1291, 1294(1).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit correctly held that Plaintiffs' claims were not expressly pre-empted by the Boat Safety Act. *Lewis*, 107 F.3d at 1501. It went on to hold, however, that Plaintiffs' claims were impliedly pre-empted. As shown below, this finding of implied pre-emption is in conflict with prior analogous decisions of this Court, most notably *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); and *Lohr v. Medtronic, Inc.*, ___ U.S. ___, 135 L.Ed.2d 700 (1996). Petitioners therefore petition this Court for a Writ of Certiorari to resolve this conflict of important federal law.

1. Implied Pre-emption Analysis is Inapposite Under *Cipollone* and its Progeny.

This Court, through *Cipollone* and its progeny, has established a common sense framework to determine the pre-emptive scope of a federal act. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains *the best evidence of Congress' pre-emptive intent.*" *CSX Transp., Inc. v. Easterwood*, 507 U.S. ___, ___, 123 L.Ed.2d 387, 396

(1993) (emphasis added). While the presence of an express pre-emption clause does not entirely foreclose the possibility of implied pre-emption, the pre-emptive scope of an act may still be "governed by [its] express language" if it provides a "reliable indicium of Congressional intent with respect to state authority." *See Cipollone*, 505 U.S. at ___, 120 L.Ed.2d at 423. The Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Cipollone*, 505 U.S. at ___, 120 L.Ed.2d at 422 (emphasis added).

The Pre-emption Clause of the Boat Safety Act provides in pertinent part that

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under Section 4302 of this title.

46 U.S.C. § 4306. The Boat Safety Act "Savings Clause" further provides that

> *(c)ompliance* with this chapter or standards, regulations, or orders prescribed under this chapter *does not relieve a person from liability at common law or under State law.*

46 U.S.C. § 4311(g) (emphasis added).

Congress has aptly shown its ability to expressly refer to "common law" when it intends to include it within the scope of a pre-emption clause, although it did

not do so in the Pre-emption Clause of the Boat Safety Act. *Compare, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (pre-empting rights "under the common law or statutes of any State"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) (pre-empting any "State constitution, statute, court decree, common law, rule, or public policy"); *see also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (pre-empting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). "Where Congress knows how to say something but chooses not to, its silence is controlling." *In Re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. ___, 128 L.Ed.2d 556 (1994)).

More importantly, Congress showed in the Savings Clause of the Boat Safety Act *itself* that it expressly considered "common law" in this piece of legislation. Instead of including it in the Pre-emption Clause, though, Congress expressly preserved common law from pre-emption by including it in the Savings Clause. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, ___, 128 L.Ed.2d 302, 311 (1994) (internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, ___, 124 L.Ed.2d 118, 128 (1993) (same).

Congress' decision to forego listing "common law" in the Boat Safety Act's Pre-emption Clause, coupled with its express *inclusion* in the Savings Clause, is the best evidence (let alone a "reliable indicium") of Congress'

intent in regard to common law. That intent, as set forth in the express terms of the Boat Safety Act and supported by the presumptions detailed above, is to save common law liability from pre-emption. *See also, e.g. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (the lack of federal remedies in an act makes it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

Thus, while the Eleventh Circuit was correct in holding that there was no express pre-emption of common law claims, it erred in then implying pre-emption given the lack of "clear and manifest purpose" to do so. Rather, the Boat Safety Act expressly provides "a reliable indicium of Congressional intent with respect to state authority". It is therefore improper under *Cipollone* to further imply pre-emption when Congress has clearly and expressly stated that which it intended to pre-empt.

2. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Pre-emption under *Freightliner.*

The Boat Safety Act pre-empts laws, regulations and requirements which conflict with any "regulation prescribed under section 4302 of (the Boat Safety Act)." 46 U.S.C. § 4306. The Coast Guard submitted the issue of propeller guards to a subcommittee, which recommended in 1989 that "(t)he U.S. Coast Guard should take no regulatory action to require propeller guards" at that time. The Coast Guard then internally adopted this recommendation to take no regulatory action. This mere

internal adoption of a recommendation cannot have any pre-emptive effect as it does not meet the express requirements of either § 4302 of the Boat Safety Act, or the requirements of the Administrative Procedures Act, 5 U.S.C. §§ 551-559.

The Administrative Procedures Act applies to all "substantive rules" having "substantive legal effect." *See FLRA v. U.S. Dept. of Navy*, 966 F.2d 747, 762 n. 14 (3rd Cir. 1992). The Coast Guard never began (much less finished) a formal rulemaking process with respect to propeller guards under the Administrative Procedures Act, however, as there was no notice of proposed rulemaking published in the Federal Register as required by 5 U.S.C. § 553(b), and no publication of any substantive rule banning propeller guards as required by 5 U.S.C. § 553(d). *Compare* 46 C.F.R. § 160 *et seq.* (1995) (regulations under the Boat Safety Act which have been properly published in the Federal Register as required). Moreover both § 4302(b) of the Boat Safety Act itself, and § 553(d) of the Administrative Procedures Act, require that regulations promulgated thereunder must be published, and must establish a future effective date. The record does not show that these requirements were ever met, either. Thus this adopted recommendation to not undertake regulatory action was not a "regulation" under the Administrative Procedures Act, nor was it "prescribed under Section 4302" of the Boat Safety Act. The mere internal adoption of a recommendation therefore fails to meet the express requirements of the Pre-emption Clause. 46 U.S.C. § 4306.

Congress gave an express dictate (let alone a "reliable indicium" of its intent) with respect to state authority, i.e., that state law would only be pre-empted by "regulations"

which were "prescribed under section 4302". It is therefore improper to imply that the pre-emptive scope expands beyond that which Congress unequivocally stated. Simply put, claims relating to propeller guards cannot be pre-empted by federal law *where there is no federal regulation on the subject as required by the express terms of the Pre-emption Clause.*

A similar implied pre-emption scenario was rejected by this Court in *Freightliner*. In the analogous case of anti-lock brakes, the agency empowered to make regulations under the Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*, had passed standards in regard to braking ("Standard 121") but these standards were suspended by a federal court. *See Freightliner*, 514 U.S. at ___, 131 L.Ed.2d at 391. Thus, the manufacturer's case was even stronger in *Freightliner* because, although not in force, the rulemaking agency had promulgated and maintained specific standards "so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.' " *Id.* (quoting 44 Fed. Reg. 46849 (1979)). Nonetheless, the suspension of the regulation was sufficient for this Court to hold that plaintiffs' state law claims were not expressly or impliedly pre-empted.

> Petitioners' pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. . . . [I]t is not impossible for petitioners to comply with both federal and state law because *there is simply no federal standard for a private party to comply with.* Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 *imposes no requirements either requiring or prohibiting* ABS systems, tractor-trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability.

Freightliner, 514 U.S. at ___, 131 L.Ed.2d at 393-394 (emphasis added).

The case at bar is nearly identical to *Freightliner* because the Coast Guard has never promulgated affirmative regulations under section 4302 "either requiring or prohibiting (propeller guards)" and "has not ordered (engine) manufacturers to refrain from using (propeller guards)." There is therefore no clear regulation under section 4302 in regard to propeller guards, and thus nothing in force to pre-empt Petitioners' claims. *There is no federal requirement which a common law claim would undermine or abrogate in regard to propeller guards,* and it is therefore improper to imply pre-emption on the basis that it would interfere with Congressional intent.

> [W]e cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." (cits). In the absence of a promulgated safety standard, *the Act simply fails to address the need for ABS devices at all.* Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. *A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.*

Freightliner, 514 U.S. at ___, 131 L.Ed.2d at 394 (emphasis added). Since there has been no "promulgated safety

standard" in regard to propeller guards, and manufacturers have not been "ordered . . . to refrain from using" propeller guards, there is nothing which a common law verdict could do to undermine Congressional purpose *where no purpose exists*. The *Freightliner* rationale should therefore be dispositive in denying Brunswick's pre-emption argument, as should the clear and express pre-emption language contained in the Boat Safety Act.

3. The Savings Clause Can Be Given Full Effect Under *Lohr* Without Implying Pre-emption.

The Eleventh Circuit in effect held that the lack of any affirmative regulation on propeller guards gives manufacturers the option as a matter of implied federal regulation to either include guards or not. There is no express provision in the Boat Safety Act which suggests that this option was a goal of Congress when it enacted the Boat Safety Act. Rather, the Boat Safety Act expressly provides that "(c)ompliance (with the Boat Safety Act) does not relieve a person from liability at common law. . . . " 46 U.S.C. § 4311(g). Thus the Savings Clause provides that even if such an unregulated option exists, *its exercise is potentially subject to common law liability*. The Savings Clause can thus be given full effect without frustrating congressional purposes, since neither the Boat Safety Act nor the Coast Guard require Brunswick to do anything whatsoever in regard to propeller guards. *See Lohr*, ___ U.S. at ___, 135 L.Ed.2d at 725-726 (common law survives if the result of common law "merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law"); *California*

Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (implied pre-emption occurs when it is physically impossible to comply with both federal and state law).

The Eleventh Circuit interpreted the Savings Clause to mean that a manufacturer can only be held liable if it were to actually install a defective guard. Petitioners respectfully ask: why would any manufacturer ever install a propeller guard if that was the only way in which it could be held liable, *even if such a guard made its product safer*? There is no textual support to differentiate torts of commission (providing a propeller guard) from torts of omission (failure to provide a guard), since the manufacturer "complies" with the Boat Safety Act in either case; this "compliance (with the Boat Safety Act) does not relieve (the manufacturer) from liability at common law . . . ". 46 U.S.C. § 4311(g). As stated in reference to the analogous Motor Vehicle Safety Act:

> (g)overnment regulations provide uniform performance requirements to deter manufacturers from marketing defectively designed products. Design defect litigation, because it is fact intensive, insulated from the political process, and capable of responding to rapid technological advances, provides more individualized remedies for harm caused by defective designs. Thus, whereas the NHTSA may have found it impossible, from a cost and benefit standpoint and based on the breadth of its research, to propose a uniform stability regulation at this time, litigation may be better suited to the task of assessing individual types of vehicles and incidents. Contrary to the manufacturer's argument, it is not clear that this is not, in fact, what

> Congress had in mind when it included the "savings clause" in the Safety Act.

In Re Ford Motor Co. Bronco II, 1995 WL 683854, p. 6 (E.D. La. Nov. 13, 1995)

This astute declaration is directly on point with the case *sub judice*. The Coast Guard decided to adopt a recommendation to not even undertake formal regulatory rule-making procedures in regard to propeller guards at the time, in part, because it was uncertain whether uniform rules could be enacted at the time to apply to the myriad of boat engines on the market.[1]

Common law actions, as noted by the *Bronco* Court, "provide[ ] more individualized remedies" and "may be better suited to the task of assessing individual types of vehicles and incidents." This may be exactly what Congress had in mind when it included the Savings Clause in the Boat Safety Act. Indeed, the Coast Guard subcommittee recognized that litigation over propeller guards was ongoing, yet it did *not* mention that it intended to pre-empt these actions. There is no "clear and manifest" intent in the Boat Safety Act to differentiate between torts of omission and commission, and thus pre-emption should not be implied where it is expressly saved.

There is no textual support to conclude that a manufacturer's negligence through adding a propeller guard is

[1] The parties disagree as to whether Brunswick can produce a feasible propeller guard, and both have cited the record below to support their contentions. This is a factual dispute for trial which does not go to the pre-emption issue itself, and which has not yet been fully explored since this cause was submitted for summary judgment prior to discovery.

not pre-empted, while a manufacturer's negligence through failure to add a propeller guard is simultaneously pre-empted. Both the provision or non-provision of the guard "complies" with the Boat Safety Act, and by the express terms of the Savings Clause is subject to common law liability. There being no conflict between the expressly saved imposition of common law and the lack of any federal standard on propeller guards, it is error to impliedly pre-empt Plaintiffs' common law claims.

Thus, under this Court's prior holding in *Lohr* and *Freightliner*, it was error to impliedly pre-empt Appellants' claims.

CONCLUSION

The Eleventh Circuit has written an opinion that would give pre-emptive effect to the work of a study group, informal opinions or an agency decision to do nothing. This finding is not in accordance with recent Supreme Court authority cited herein, nor is it consistent with the express language used by Congress in enacting the Boat Safety Act. For all the foregoing reasons, Petitioners believe that the circuit decision is in conflict with United States Supreme Court precedent, and raises questions of fundamental, constitutional and exceptional

importance. Petitioners therefore respectfully request that their Petition For Writ of Certiorari be granted.

Respectfully submitted,

DAVID E. HUDSON
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564
Augusta, Georgia 30903
(706) 722-4481

APPENDIX

TABLE OF CONTENTS

A. Opinions in the Case:

1. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997). Appeal No. 96-8130. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts). A1
2. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996). Civil Action No. CV 195-096. Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy). A26
3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997. . . . . A33

B. Statutory Provisions Involved:

1. 5 U.S.C. § 553. . . . . A37
2. 46 U.S.C. § 4302. . . . . A39
3. 46 U.S.C. § 4306. . . . . A41
4. 46 U.S.C. § 4311. . . . . A41

Vicky LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Gary Lewis, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

v.

BRUNSWICK CORPORATION, Defendant-Appellee.

No. 96-8130.

United States Court of Appeals, Eleventh Circuit.

March 21, 1997.

Parents of recreational boat passenger who died after she fell or was thrown from boat and was struck by the boat's propeller brought suit in state court against manufacturer of boat's outboard engine, asserting negligence and strict liability claims based on absence of propeller guard. Parents also asserted fraudulent misrepresentation claims, based on contention that manufacturer misrepresented performance differences between guarded engines and unguarded engines to discourage government agencies from adopting safety standard requiring propeller guards. After removal, the United States District Court for the Southern District of Georgia, No. CV 195-096, Dudley H. Bowen, Jr., J., 922 F.Supp. 613, granted summary judgment in favor of manufacturer on ground that claims were preempted by the Federal Boat Safety Act (FBSA), and plaintiffs appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) text of the FBSA does not provide clear manifestation of intent to preempt claims, and thus they were not expressly preempted; (2)

position of Coast Guard rejecting propeller guard requirement is tantamount to a ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in the form of common-law state tort claims; and (3) Coast Guard position on propeller guards also preempted fraudulent misrepresentation claim.

Affirmed.

Appeal from the United States District Court for the Southern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

CARNES, Circuit Judge:

Gary and Vicky Lewis appeal the district court's grant of summary judgment in favor of Brunswick Corporation ("Brunswick") on the Lewises' state common law negligence, product liability, and fraudulent misrepresentation claims. The Lewises sued Brunswick to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and then struck by a Brunswick engine propeller. According to the Lewises, the Brunswick engine involved in their daughter's death was defective because it lacked a propeller guard. Upon Brunswick's motion for summary judgment, the district court held that the Lewises' claims were preempted by the Federal Boat Safety Act, 46 U.S.C. §§ 4301-4311 ("the FBSA" or "the Act"). We affirm.

In Part I of this opinion, we describe the facts and the procedural history of this case. We describe the standard of review in Part II, and we outline the Act and its regulatory scheme in Part III. In Part IV, we recount the

actions taken by the Coast Guard regarding propeller guards. We then summarize the positions of the parties in Part V of the opinion. In Part VI, we describe in general terms how state law may be preempted. We then proceed to consider, in Parts VII and VIII of the opinion, whether the Lewises' claims are preempted by the Act.

As we will explain in Part VII, the preemption clause and the savings clause in the Act provide contradictory indications of congressional intent relating to whether the Lewises' claims are expressly preempted. Because the text of the FBSA does not provide a clear manifestation of intent to preempt the claims, we cannot hold that they are expressly preempted. On the other hand, due to the conflict between the preemption clause and the savings clause, we cannot hold that those claims are expressly saved from preemption either. Consequently, our resolution of the question of preemption in this case turns on whether the Lewises' claims are impliedly preempted by the Act. We hold that they are, because those claims conflict with the Coast Guard's position that propeller guards should not be required.

I. FACTS AND PROCEDURAL HISTORY

On June 6, 1993, Kathryn Lewis was spending the day with her boyfriend's family in a boat on Strom Thurmond Lake in Georgia. While the boat was pulling Kathryn's boyfriend on an inner tube, the driver made a right-hand turn. Kathryn fell or was thrown from the left side of the boat. Once in the water, Kathryn was struck repeatedly in the head and body by the propeller of an engine designed and manufactured by Brunswick. The

engine did not have a propeller guard. Kathryn died instantly.

The Lewises filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product. They also claim that Brunswick committed negligence by failing to install a propeller guard on the engine. The Lewises' third claim avers that Brunswick attempted to suppress the production of propeller guards by third persons and exaggerated the performance differences between guarded engines and unguarded engines to discourage government agencies from adopting a safety standard requiring propeller guards.

Brunswick removed this case to federal district court on diversity grounds and moved for summary judgment. In its summary judgment motion, Brunswick contended that all of the Lewises' claims were preempted by the FBSA. The district court agreed and granted summary judgment in favor of Brunswick. The Lewises appeal.

II. STANDARD OF REVIEW

We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo*. *E.g., Southern Solvents, Inc. v. New Hampshire Ins. Co.*, 91 F.3d 102, 104 (11th Cir.1996).

III. THE FEDERAL BOAT SAFETY ACT

The FBSA was enacted in 1971 in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." *P.L. 92-75, Federal Boat Safety Act of 1971*, S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333. To implement that goal, the Act grants authority to the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302 (West Supp.1995). The Secretary of Transportation has delegated rulemaking authority under the FBSA to the United States Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1996).

The FBSA requires the Coast Guard to follow certain guidelines and procedures when promulgating a regulation under 46 U.S.C. § 4302. For instance, the Coast Guard must consider certain available data and "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C.A. § 4302(c)(1)-(2) (West Supp.1995). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C.A. § 4302(c)(3) (West Supp.1995). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4).

IV. COAST GUARD CONSIDERATION OF A PROPELLER GUARD REGULATION

In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and safety disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989) ("Report"). The Advisory Council also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at Appendix A.

The Advisory Council Subcommittee held hearings on three occasions and received information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 2-4. One of the matters on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *Id.* at 4. That section states that, at the time of the hearings, propeller guard advocates were petitioning federal and state legislators to mandate propeller guards. According to the Subcommittee Report, a legislative or administrative mandate "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them"; therefore, feasibility was an important question before the Subcommittee. *Id.* at 5. The report also discusses the theories of liability that

were being asserted by propeller guard victims and the defenses used by manufacturers. *Id.* at 4-5. Immediately following that discussion, the report notes that "[m]anufacturers are opposed to mandatory propeller guards." *Id.* at 5.

The Subcommittee also considered the technical issues posed by propeller guards. After reviewing the available scientific data and testimony, the Subcommittee found that propeller guards affect boat operation adversely at speeds greater than 10 miles per hour. *Id.* at 21. Further, the Subcommittee found that propeller guards would not increase overall safety, because they increase the chances of contact between a blunt object and a person in the water. *Id.* at 20-21. The Subcommittee Report states:

> Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence. . . . Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public

must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at 23-24. The report also states that:

> boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should not be mandated. The Subcommittee does not agree. . . .

Id. at 20. In its conclusion, the Advisory Council Subcommittee Report recommends that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee presented its report to the entire Advisory Council, which accepted the report and adopted the recommendations of the Subcommittee. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. The Coast Guard adopted each of the Advisory Council's recommendations, giving explanations of the Coast Guard's position on each matter. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway

Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The Coast Guard's position on propeller guards, which is set out in that letter, is as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guard devices or other information on the state of the art.

Id. at 1.

V. POSITIONS OF THE PARTIES

The Lewises contend that the FBSA does not expressly or impliedly preempt state law tort claims based on the absence of a propeller guard on a boat engine. According to the Lewises, common law claims are expressly saved from preemption by the Act's savings clause. Furthermore, the Lewises argue, the Act does not preempt any state law, regulation, or claims until the

Coast Guard issues a formal regulation on the matter. There being no regulation on propeller guards, the Lewises assert they may proceed with their case.

In response, Brunswick argues that the FBSA expressly preempts any state regulation, including regulation through common law claims, that conflicts with a Coast Guard regulation or regulatory position. Brunswick contends that the Coast Guard has made a regulatory decision that propeller guards cannot be required. For that reason, Brunswick says, the Lewises' claims are expressly preempted by the Act. Furthermore, even if the Lewises' claims are not expressly preempted, Brunswick argues that the claims conflict with the Coast Guard's position that propeller guards should not be required. For that reason, Brunswick contends, the claims are preempted by implication.

VI. AN OVERVIEW OF PREEMPTION DOCTRINE

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). State regulation established under the historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Id.* Accordingly, the intent of Congress is the touchstone of preemption analysis. *See id.*

Congressional intent to preempt state law may be revealed in several ways: (1) "express preemption," in which Congress defines explicitly the extent to which its

enactments preempt state law; (2) "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996) (citations omitted).

By including an express preemption clause in the FBSA, Congress has demonstrated its intent that the Act preempt at least some state law. *See* 46 U.S.C. § 4306. Therefore, the issue in this case is not whether Congress intended for the FBSA to have any preemptive effect, but the intended scope of preemption – the extent to which the FBSA preempts state law. *See Medtronic, Inc. v. Lohr*, ___ U.S. ___, ___, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). In areas traditionally regulated by the states through their police powers, we apply a presumption in favor of a narrow interpretation of an express preemption clause. *Id.* at ___, 116 S.Ct. at 2250.

VII. EXPRESS PREEMPTION

Brunswick contends that the Lewises' claims fall within the scope of the FBSA's express preemption clause, which provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C.A. § 4306 (West Supp.1995). According to Brunswick, the Lewises' claims, if successful, would result in a regulation imposing a propeller guard requirement. That regulation would not be identical to – in fact, it would be in conflict with – the Coast Guard's position that propeller guards should not be required. In Brunswick's view, the Coast Guard's position is equivalent to a "regulation prescribed under section 4302," which preempts state law. Following this reasoning, Brunswick argues that the Lewises' claims are preempted by the express terms of the FBSA preemption clause.

In response, the Lewises contend that the phrase "law or regulation" does not reach common law claims, because Congress did not mention "common law" specifically in the preemption clause. According to the Lewises, Congress' decision not to specify "common law" in the preemption clause demonstrates congressional intent to save common law claims. As Brunswick points out, however, the omission of the phrase "common law"

in the preemption clause is not determinative, because "law" and "regulation" may be read to include state tort actions. *See Cipollone*, 505 U.S. at 520-30, 112 S.Ct. at 2619-25 (1992) (plurality opinion) (holding that the phrase "State law" in the Federal Cigarette Labeling and Advertising Act was intended to include common law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (common law claims fall within the scope of the phrases "law, rule, regulation, order, or standard"). In fact, the overwhelming majority of courts have held that common law claims fall within the scope of "law[s]" and "regulation[s]" expressly preempted by the FBSA. *See Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 186 (E.D.Cal.1996); *Davis v. Brunswick Corp.*, 854 F.Supp. 1574, 1580 (N.D.Ga.1993); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D.Conn.1993); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D.Ga.1991); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio1991); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 497-98, 607 N.E.2d 562, 566-67 (1992); *Ryan v. Brunswick Corp.*, 454 Mich. 20, 557 N.W.2d 541, 548-49 (1997). *Contra Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994).

We agree that the terms "law" and "regulation" evidence an intent to include common law claims. However, we stop short of concluding that common law claims are expressly preempted by the FBSA, because another provision in the Act pulls us away from that conclusion. As the Lewises point out, Congress included a savings clause in the Act, which seems to save common law claims from

preemption. That clause, which is found within the section of the Act entitled "Penalties and Injunctions," provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West Supp.1995).

Because the FBSA preempts an area (safety) that historically has been regulated by the states through their police powers, we must construe the Act's preemption clause narrowly. *See Medtronic*, ___ U.S. at ___, 116 S.Ct. at 2250. The preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading. Instead, we must resolve doubts in favor of the narrower interpretation of the preemption clause and conclude that the express preemption clause does not cover common law claims. We hold that those claims are not expressly preempted.

The Lewises urge us to go further and hold that the savings clause demonstrates clear congressional intent to save common law claims from preemption. We find congressional intent to be less than clear, given the conflicting language in the preemption and savings clauses. Just as the conflict between those provisions prevents us from concluding that the Lewises' claims are expressly preempted, so also does that conflict prevent us from concluding that those claims are expressly saved. *See Taylor v. General Motors Corp.*, 875 F.2d 816, 825 (11th Cir.1989)

(interpreting the National Traffic and Motor Vehicle Safety Act). The express terms of the FBSA simply fail to answer the question of whether Congress intended to preempt common law claims. As a result, our decision about preemption depends on whether the Lewises' claims are impliedly preempted by federal law. *See id.* at 827-28.

VIII. IMPLIED CONFLICT PREEMPTION

The Lewises' claims are preempted impliedly by the FBSA to the extent that those claims conflict with the "accomplishment and execution of the full purposes and objectives of Congress." *See Freightliner Corp. v. Myrick*, 514 U.S. 280, ___, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). In other words, the Lewises' claims are preempted if they prevent or hinder the FBSA from operating the way Congress intended it to operate. In deciding whether the Lewises' claims conflict with the purposes of the FBSA, we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state. *Taylor*, 875 F.2d at 826. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988) (citations omitted).

According to Brunswick, the Lewises' claims are preempted by implication because those claims would interfere with the regulatory scheme enacted by Congress in the FBSA. Brunswick argues that the Coast Guard has the last say on whether a safety feature on boats or associated equipment should be required. Where the Coast Guard believes that a safety feature should not be required, Brunswick argues that states may not require the feature, even through common law claims.

"[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis in original). Though a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988), it does "where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978) (citations omitted).

The Lewises argue that the rule of *Atlantic Richfield* does not apply here, because Congress did not intend for a mere decision not to regulate to have preemptive effect under the FBSA. In the Lewises' view, any state regulation on boat and equipment safety standards is permissible, unless the Coast Guard promulgates a regulation

that conflicts with the state regulation. As the Lewises understand the FBSA regulatory scheme, a Coast Guard position not to impose a safety standard on a matter leaves room for states to impose safety standards on that matter. There being no regulation on propeller guards, the Lewises argue that their claims are not affected by the Coast Guard's position. For support, they point to *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), a case in which the Supreme Court concluded that an absence of regulation on a safety matter did not preempt state common law claims imposing such standards.

In *Freightliner*, the Supreme Court considered whether common law claims based on the failure to install antilock brakes were expressly or impliedly preempted by the Vehicle Safety Act. *See id.* at ___, 115 S.Ct. at 1485. The preemption clause in the Vehicle Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1982) (repealed 1994). The defendants in *Freightliner* argued that the failure-to-install claims were preempted, because the relevant agency had

indicated its intent to regulate braking systems by promulgating a regulation on that matter. That regulation was struck down by an appellate court, but the defendants in *Freightliner* believed it still had preemptive effect, because it demonstrated the agency's intent to forbid state regulation on braking systems. *Id.* at ___, 115 S.Ct. at 1487.

The Supreme Court rejected that argument. First, the Court explained, there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Id.* In fact, the preemption clause in that act clearly implied that states could impose safety standards on auto manufacturers, until the federal government came forward with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect under the *Atlantic Richfield* doctrine; instead, the agency's failure to put into effect a valid regulation left the state common law intact. *Id.* Furthermore, the Court reasoned, *Atlantic Richfield* was inapposite because:

> the lack of federal regulation [on antilock brakes] did not result from an affirmative decision of agency officials to refrain from regulating air brakes. [The agency] did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state.

Id. (footnote omitted).

In contrast to the Vehicle Safety Act, the FBSA was intended to give its regulatory agency – the Coast Guard – exclusive authority to issue safety standards:

> This section [containing the preemption clause] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.
>
> The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1341. *See Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990) ("[T]he [FBSA] gives the Coast Guard the exclusive responsibility for establishing safety regulations.") (dicta); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1577 & n. 4 (11th Cir.1986) (with the FBSA Congress

expressly preempted state regulation regarding performance and safety standards for boats and associated equipment) (dicta). While an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate. *Freightliner* is distinguishable for that reason.

Also in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards. Unlike the agency in *Freightliner*, the Coast Guard did not try to promulgate a regulation, and then fail, under a statutory scheme that would leave state law intact in the absence of federal regulatory action. Instead, under a statutory scheme that forbids any state standard or regulation "not identical to" a federal regulation, the Coast Guard decided not to issue a regulation. After consulting with the Advisory Council and reviewing the available data, the Coast Guard reached a carefully considered decision that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats."

The Coast Guard did not decide that only a federal regulation would be inappropriate, but that the scientific data counseled against any regulation requiring propeller guards. Given that Congress intended for the FBSA to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements. *See Ryan v. Brunswick Corp.*, 454 Mich. 20, 557

N.W.2d 541, 549-50 (1997). *See also Puerto Rico*, 485 U.S. at 503, 108 S.Ct. at 1355 ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn – not from federal inaction alone, but from inaction joined with action.") (emphasis in original). *Freightliner* does not require that we hold otherwise.

But the Lewises contend that even if *Freightliner* is not controlling here, we cannot find an implied conflict between their claims and the Act, because we know from the savings clause that Congress expected some common law claims to be brought in this area. About the savings clause, the Senate report says:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352.

From the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme. In order to decide which claims, we must determine when product liability claims can be brought without upsetting the

overall scheme Congress intended. Addressing that question, several courts have held that the only claims which do not present a conflict with the FBSA regulatory scheme are product liability claims based on the defective design or installation of products that are already installed, as opposed to claims based on the failure to install a certain safety device. *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 182, 133 L.Ed.2d 120 (1995); *Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal.1996); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Rubin v. Brutus Corp.*, 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 498, 607 N.E.2d 562, 567 (1992); *Ryan v. Brunswick Corp.*, 209 Mich.App. 519, 531 N.W.2d 793, 796 n. 1 (1995), *aff'd*, 454 Mich. 20, 557 N.W.2d 541 (1997); *Mulhern v. Outboard Marine Corp.*, 146 Wis.2d 604, 432 N.W.2d 130, 134-35 (1988). Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe.

By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA. Without doubt, the Lewises' product liability claims seek to impose a propeller guard

requirement. *See Carstensen*, 49 F.3d at 432. That requirement conflicts with the FBSA's grant of exclusive regulatory authority to the Coast Guard, and for that reason those claims are in conflict with and are therefore preempted by the Act.

The Lewises argue that their fraud claim should be treated differently from their other claims, because it would not create a propeller guard requirement beyond FBSA requirements. We disagree. If the Lewises succeeded with their fraud claim, a jury could impose liability upon Brunswick for attempting to persuade the Coast Guard and others that propeller guards are unsafe. The necessary element of causation in any such claim would be that but for the wrongful conduct of Brunswick, propeller guards would have been required by the Coast Guard. Such a judgment would conflict with the Coast Guard's position that propeller guards should not be required. Thus, the fraud claim is impliedly preempted by the Coast Guard's position and the preemptive effect given that position by the FBSA.

Regulatory fraud claims of this nature are impliedly preempted for fundamental, systemic reasons. Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that

the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result. Ironically, such circumvention of the regulatory scheme likely would be more pronounced where, as here, Congress mandated more extensive industry input into the regulatory process. *See* 46 U.S.C. § 4302(c). Congress could not have intended for the process it so carefully put in place to be so easily and thoroughly undermined.[1]

In sum, we conclude that because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed. That position impliedly preempts state law requirements of propeller guards, even in the form of common law claims. It also prevents plaintiffs from bringing fraud claims intended to demonstrate that the Coast Guard would have reached a different conclusion on the matter of propeller guards but for alleged industry manipulation or subversion of the federal regulatory process. We hold that each of the Lewises' claims is preempted by implication because it conflicts with the Coast Guard's position

---

[1] The Lewises' claim may be read to address alleged fraudulent misrepresentations by Brunswick to individuals and groups outside the federal government. To the extent that the Lewises intended to hold Brunswick liable for allegedly dissuading other manufacturers from installing propeller guards, their claim fails on causation grounds, because their daughter was struck by a propeller on a Brunswick motor. To the extent that the Lewises seek to hold Brunswick liable for alleged fraud upon state regulators, their fraud claim is preempted because state regulatory decisions of the propeller guard issue are themselves preempted.

on propeller guards and would interfere with the FBSA regulatory process designed by Congress.

IX. CONCLUSION

The district court's grant of summary judgment to Brunswick is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

VICKY LEWIS and GARY LEWIS, individually as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,	*	CIVIL ACTION NO. CV 195-96
Plaintiffs,	*	(Filed Jan. 22, 1996)
vs.	*	
BRUNSWICK CORP.,	*	
Defendant.	*	

ORDER

Before the Court is Defendant's Motion for Summary Judgment in the above-captioned case. Upon consideration of the parties' briefs and oral arguments before this Court on December 14, 1995, the Motion for Summary Judgment is **GRANTED** for the reasons stated below.

For purposes of this motion, the parties stipulate the following facts. On June 6, 1993, Plaintiffs' decedent fell or was thrown from a recreational boat. She died from injuries she sustained immediately after her fall when she was struck by the boat's propeller. The boat involved in the accident was equipped with an outboard motor and propeller manufactured or marketed by Defendant Brunswick Corp. ("Brunswick").

The decedent's parents filed this action against Brunswick, asserting common law claims premised on Brunswick's failure to equip the outboard motor with some form of propeller guard. Brunswick contends that these claims are preempted by the Federal Boat Safety Act of 1971 ("FBSA"), 46 U.S.C. § 4301 *et seq.*

Under the FBSA, the Secretary of Transportation may prescribe regulations which establish "minimum safety standards for recreational vessels and associated equipment . . . " 46 U.S.C. § 4302. Rule-making authority under the FBSA has been delegated to the Commandant of the United States Coast Guard, acting through the Secretary of Transportation. The enabling legislation requires the Coast Guard to consult on such matters with the National Boating Safety Advisory Council. *Id.* § 4302(c)(4).

On May 11, 1988, the Coast Guard appointed a subcommittee of the Advisory Counsel "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers. Feasibility of some form of mechanical guard or other action to prevent such contact was to be examined." After extensive research and analysis, the subcommittee determined propeller guards would have only a negligible impact on boating safety, the guards could create new hazards of equal or greater consequence, and the guards were technologically infeasible. Its final suggestion was that the Coast Guard "should take no regulatory action to require propeller guards." These findings and conclusions were adopted unanimously by the Advisory Council.

In a letter of February 1990, Rear Admiral Robert T. Nelson adopted the Advisory Council's recommendation as the position of the Coast Guard, stating, "Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Brunswick argues this decision not to require propeller guards preempts any state attempt to require the installation of propeller guards, including common law tort claims.

Generally, any state law that conflicts with federal law is preempted and without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Federal preemption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, the critical question in testing preemption is whether Congress intended that the relevant federal regulation or law supersede state law.

Section 4306 of the FBSA, which is relevant to identifying the FBSA's preemptive reach, provides the following:

> [A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

This section prohibits states from establishing or enforcing safety standards that are not identical to regulations prescribed under Section 4302 of the FBSA. Common law causes of action may constitute state regulation and "impose a requirement" on manufacturers to have propeller guards through an award of damages. *Cipollone*, 505 U.S. at 521 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). Common law damages actions are premised on the existence of a legal duty. *Id.* Thus, such actions necessarily impose "requirements" or "standards" subject to federal preemption. *Id.* at 521-22, *cited in CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (summarizing *Cipollone* as stating that when a federal statute bars additional requirements imposed under state law, the federal statute preempts common law claims); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993). Also, the words "law" and "regulation" include common law tort claims. Accordingly, because the Coast Guard has expressly chosen not to require propeller guards as a minimum safety requirement, a damage award against Brunswick based on a common law tort claim would impose a regulation on it "not identical" to federal law.

Plaintiffs argue that there has been no clear "regulation" of propeller guards. However, the Coast Guard's position on the use of propeller guards is that there should be no regulation requiring propeller guards. The Coast Guard reached this decision only after extensive research, testing, and testimony. The final report of the Advisory Council indicates that the use of propeller guards is infeasible, ineffective as a safety measure, and

indeed, imposes unique safety hazards. Thus, the decision that the area is best left unregulated has as much preemptive effect as a determination to regulate. *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983).

I find that the Coast Guard's action in this matter is tantamount to a prohibition against states from adopting a regulation requiring propeller guards on recreational boats. Thus, a common law action premised on the failure to provide a propeller guard is a preempted state requirement under Section 4306 of the FBSA. This finding is supported in the following published cases: *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 116 S. Ct. 182 (1995); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan v. Brunswick Corp.*, 531 N.W.2d 793 (Mich. Ct. App. 1995); *Farner v. Brunswick Corp.*, 607 N.E.2d 562 (Ill. Ct. App. 1992), *appeal denied*, 616 N.E.2d 333 (Ill. 1993).

Even if the Coast Guard sufficiently demonstrated an intent to allow manufacturers to build boat motors without propeller guards, Plaintiffs contend that the FBSA's savings clause preserves common law tort actions regardless of the action taken by the Coast Guard. Section 4311(g) provides: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."

Plaintiffs argue this savings clause expresses Congress' clear intention to preserve common law tort claims under the Act, especially because Section 4306 does not expressly provide for the preemption of common law claims. Plaintiffs concede that had the savings clause not been in the FBSA, the Court would be free to include common law claims in the terms "law" and "regulation" in the preemption clause. However, because the savings clause was included, they argue those terms are stripped of the inclusion of common law claims. Plaintiffs cite the Eleventh Circuit decision in *Myrick v. Freuhauf Corp.* in support of this position. 13 F.3d 1516 (11th Cir. 1994), *aff'd sub. nom., Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995). However, the preemptive clause in the Motor Vehicle Safety Act at issue in *Myrick* was much narrower. It only preempted state safety "standards," not "laws, regulations, and requirements." Thus, *Myrick* is distinguishable.

Other courts have reconciled the savings clause with the preemption clause, finding that the savings clause preserved claims of liability for defectively designed products that are *actually installed*. *Shield*, 822 F. Supp. 81; *Mowery*, 773 F. Supp. 1012. Thus, if Brunswick chose to surpass the minimum requirements of the Coast Guard and install propeller guards, the savings clause would preserve common law tort claims based upon any defective design thereof.

For the reasons stated above, I find Plaintiffs' claims in this action are preempted under Section 4306 of the FBSA. Accordingly, Defendant's Motion for Summary Judgment is **GRANTED**. The clerk is instructed to

CLOSE this case and **ENTER FINAL JUDGMENT** in favor of Defendant, taxing costs against Plaintiffs.

ORDER ENTERED at Augusta, Georgia, this 22nd day of January, 1996.

/s/ Dudley H. Bowen Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8130

VICKY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, GARY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

versus

BRUNSWICK CORPORATION, Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

---

(Filed May 15, 1997)

BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants, VICKY LEWIS AND GARY LEWIS, individually as parent, as next friend, and as administrator of the estate of Kathryn C. Lewis is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8130

VICKY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, GARY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

versus

BRUNSWICK CORPORATION, Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

---

(Filed May 15, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE CIRCUIT COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

---

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

46 U.S.C. § 4302

§ 4302. Regulations

(a) The Secretary may prescribe regulations –

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard –

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, life-saving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless

the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things –

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations referred to in clauses (1)-(3) of this subsection.

(d) Section 8903 of this title does not apply to a vessel being operated for bona fide dealer demonstrations provided without fee to business invitees. However, if on the basis of substantial evidence, the Secretary

decides under this section that requiring vessels so operated to be under the control of licensed individuals is necessary for boating safety, then the Secretary may prescribe regulations requiring the licensing of individuals controlling these vessels in the same manner as provided in chapter 89 of this title for individuals in control of vessels carrying passengers for hire.

* * *

46 U.S.C. § 4306

§ 4306. Federal preemption

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

* * *

46 U.S.C. § 4311

§ 4311. Penalties and injunctions

(a) A person willfully operating a recreational vessel in violation of this chapter or a regulation prescribed

under this chapter shall be fined not more than $5,000, imprisoned for not more than one year, or both.

(b) A person violating section 4307(a)(1) of this title is liable to the United States Government for a civil penalty of not more than $2,000, except that the maximum civil penalty may be not more than $100,000 for a related series of violations. When a corporation violates section 4307(a)(1), any director, officer, or executive employee of the corporation who knowingly and willfully ordered, or knowingly and willfully authorized, a violation is individually liable to the Government for the penalty, in addition to the corporation. However, the director, officer, or executive employee is not liable individually under this subsection if the director, officer, or executive employee can demonstrate by a preponderance of the evidence that –

(1) the order or authorization was issued on the basis of a decision, in exercising reasonable and prudent judgment, that the defect or the nonconformity with standards and regulations constituting the violation would not cause or constitute a substantial risk of personal injury to the public; and

(2) at the time of the order or authorization, the director, officer, or executive employee advised the Secretary in writing of acting under this clause and clause (1) of this subsection.

(c) A person violating any other provision of this chapter or other regulation prescribed under this chapter is liable to the Government for a civil penalty of not more than $1,000. If the violation involves the operation of a vessel, the vessel also is liable in rem for the penalty.

(d) When a civil penalty of not more than $200 has been assessed under this chapter, the Secretary may refer the matter of collection of the penalty directly to the United States magistrate of the jurisdiction in which the person liable may be found for collection procedures under supervision of the district court and under an order issued by the court delegating this authority under section 636(b) of title 28.

(e) The district courts of the United States have jurisdiction to restrain a violation of this chapter, or to restrain the sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation into the United States, of a recreational vessel or associated equipment that the court decides does not conform to safety standards of the Government. A civil action under this subsection shall be brought by filing a petition by the Attorney General for the Government. When practicable, the Secretary shall give notice to a person against whom an action for injunctive relief is contemplated and provide the person with an opportunity to present views and, except for a knowing and willful violation, shall provide the person with a reasonable opportunity to achieve compliance. The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.

(f) A person is not subject to a penalty under this chapter if the person –

(1) establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel or associated equipment does not conform with the applicable safety standards of the Government or that the person was not advised by

the Secretary or the manufacturer of that vessel, equipment or component that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public; or

(2) holds a certificate issued by the manufacturer of that recreational vessel or associated equipment to the effect that the recreational vessel or associated equipment conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel or associated equipment does not so conform.

(g) Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

No. 97-288

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS, AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL J. CONNOLLY
Faegre & Benson
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

KENNETH S. GELLER*
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

**Counsel of Record*

31 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

RULE 29.6 STATEMENT

Respondent Brunswick Corporation has the following subsidiaries (other than wholly-owned subsidiaries): Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc.; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT 1

A. The Boat Safety Act and Federal Preemption . 1

B. The Coast Guard's Decision Not to Require Propeller Guards 3

C. The Proceedings Below 8

REASONS FOR DENYING THE PETITION 9

I. THE BOAT SAFETY ACT EVINCES NO CONGRESSIONAL INTENT TO PRECLUDE IMPLIED CONFLICT PREEMPTION OF COMMON LAW CLAIMS 11

II. NEITHER THE ABSENCE OF A REGULATION ADOPTED UNDER THE ADMINISTRATIVE PROCEDURES ACT NOR THIS COURT'S DECISION IN *MYRICK* PRECLUDE IMPLIED PREEMPTION 15

CONCLUSION 22

TABLE OF AUTHORITIES

Cases — **Page(s)**

Allen v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) 8

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) 19

Beech v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991) 8

Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947) 20

Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) 19

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 15

Carstensen v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995) 9, 12, 15

Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 13

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 10-12, 21

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 12-13

Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 9, 12

Elliott v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991) 7-8

TABLE OF AUTHORITIES - Continued

Page(s)

Farner v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993) 10

Felder v. *Casey*, 487 U.S. 131 (1988) 12

Fidelity Federal Savings & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 15

Fitzpatrick v. *Madonna*, 424 Pa.Super. 473, 623 A.2d 322 (1993) 8

Freightliner Corp. v. *Myrick*, 514 U.S. 280 (1995) . . . . . *passim*

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 13

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 14

Medtronic, Inc. v. *Lohr*, 116 S. Ct. 2240 (1996) 10

Moore v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994) 10

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 14

Moss v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) 9-10, 12

Mowery v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991) 6, 10, 12

Mulhern v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988) 14

TABLE OF AUTHORITIES - Continued

Page(s)

Myrick v. *Freuhauf Corp.*, 13 F.3d 1516 (1994) 10

Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) 14

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 14

Paccar, Inc. v. *NHTSA*, 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862 (1978) 17

Parker v. *Outboard Motor Corp.*, No. J90-0011(L) Slip. Op. (S.D. Miss. Feb. 28, 1991) 9-10

Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 13-14

Pree v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 510 U.S. 815 (1993) 8

Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988) 19-20

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 20

Rubin v. *Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App. 1986) 14

Ryan v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997) 9

Shield v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) 9, 12

TABLE OF AUTHORITIES - Continued

Page(s)

Shields v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) 9, 12

Stanley v. *Bertram-Trojan, Inc.*, 855 F. Supp. 657 (S.D.N.Y. 1994) 19

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 14

Statutes and Regulation

15 U.S.C. §§ 1381-1431 16

15 U.S.C. § 1392(d) 16-17, 21

46 U.S.C. §§ 4301-4311 1

46 U.S.C. § 4302 . . . . . 3, 16

46 U.S.C. § 4302(a)(1) 1

46 U.S.C. § 4302(c)(4) 2

46 U.S.C. § 4305 2

46 U.S.C. § 4306 . . . . . 2, 8, 12, 21

46 U.S.C. § 4311(g) . . . . . *passim*

46 U.S.C. § 13110 2

46 U.S.C. § 13110(a) 2

46 U.S.C. § 13110(b)(1) 2

49 U.S.C. §§ 30101-30169 16

49 C.F.R. § 571.121 16-18

TABLE OF AUTHORITIES - Continued

Page(s)

Miscellaneous

Minutes of the 44th Meeting of the National Boating Safety Advisory Council (Nov. 6-7, 1989) 6-7

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* . . . 4-7

S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971) 1-3, 12

BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision in this case by asserting that the Eleventh Circuit misapplied "recent Supreme Court holdings on pre-emption." Pet. i. They do not contend that the Eleventh Circuit's decision interpreting the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("Boat Safety Act" or "Act"), conflicts with the decision of any other court under that statute. Indeed, the petition does not cite any other case that mentions — let alone interprets — the Boat Safety Act.

Contrary to the impression created by the petition, however, the Eleventh Circuit's holding that petitioners' tort claims are preempted follows a long line of federal and state court decisions finding federal preemption under the Boat Safety Act. Moreover, the three "prior analogous decisions of this Court" cited by petitioners (Pet. 3) do not compel a contrary conclusion. Those decisions, which involved completely different statutory and regulatory schemes, as well as numerous other decisions by this Court, support the preemption analysis of the Eleventh Circuit.

At bottom, the petition offers no plausible reason why the Court should review this unexceptional decision on a well-settled issue of law. In fact, the Court has denied review of this issue in several similar cases in recent Terms.

STATEMENT

A. The Boat Safety Act and Federal Preemption

The Boat Safety Act was enacted by Congress to "reduce the level of fatalities now resulting from boating mishaps" by establishing "a coordinated national boating safety program." S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971) ("Senate Report"). The safety program created by the Act requires manufacturers to comply with "national construction and performance standards for boats and associated equipment" established by the United States Coast Guard. *Id.* at 15; see 46 U.S.C. § 4302(a)(1) (authorizing "minimum safety standards for recreational vessels and associated equipment"). In considering

whether or not to adopt a safety standard, the Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Committee"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety established by the Act, 46 U.S.C. § 13110.[1]

Congress declared that the safety program established by the Boat Safety Act must be based on uniform national standards:

> The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level.

Senate Report at 14. To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (*id.* at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine

[1] The 21 members of the NBSAC, who are appointed by the Secretary of Transportation, must be individuals who have particular expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel manufacturers and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* at § 13110(b)(1).

> safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

By mandating that state laws and regulations be "identical" to regulations issued by the Coast Guard, the preemption section of the Boat Safety Act insures that boat manufacturers need not be concerned about "compliance with widely varying local requirements." Senate Report at 20. The statute does allow the states some latitude to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances." *Ibid.*[2] The preemption section reserves to the Coast Guard, however, a "right of disapproval" over these state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

The Boat Safety Act also includes a so-called "savings" clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The Senate Report on the Act explains (at 32) that the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability."

B. The Coast Guard's Decision Not to Require Propeller Guards

In 1988, the Coast Guard requested the NBSAC to consider whether propeller guards should be required on recreational

[2] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

vessels. The Coast Guard's charge to the Committee asked it to:

> • Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.
>
> • Assess the arguments for and against some form or mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report") App. A (R. Ex. 5); see Pet. App. A6.[3] In particular, the Coast Guard asked the Committee whether there should be "a federal requirement for some form of propeller guard." Subcommittee Report App. A; Pet. App. A6.

In response to the Coast Guard's request, the NBSAC established a special Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. Subcommittee Report at 1. The Subcommittee received and reviewed files and information supplied by the Coast Guard. *Ibid.* In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *ibid.; id.* at Apps. B-C, including representatives of boat manufacturers and counsel representing injured persons in product liability actions. *Id.* at 3-4.[4]

---

[3] "R." refers to the Plaintiffs' and Defendant's Joint Stipulation of Facts filed in the district court.

[4] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs in product liability litigation to advocate the use of propeller (continued...)

During its extensive fact-finding activities conducted over more than a year, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. Subcommittee Report at App. D. In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 2.

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." Subcommittee Report at App. E, 1-2. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at App. E, 2. Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 9), the number of propeller incidents is small compared to the total number of boating accidents. *Id.* at 10, App. E; see *id.* at 23 ("the propeller itself is the sole factor only in a minority of impacts").

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." Subcommittee Report at 24. Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for any pleasure craft traveling at normal operating speeds ("propeller guards affect boat operation adversely at speeds greater than 10 miles per hour" (Pet. App. A7)), serious steering and handling problems caused by propeller guards (along with

---

[4] (...continued)
guards. Subcommittee Report at App. B.

increased drag and loss of speed), and safety problems concerning underwater impacts by propeller guards. Subcommittee Report at 12-17, 20-21.[5]

In light of these substantial safety concerns, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence." Pet. App. A7. *In short, propeller guards would make boats less safe*. As a result, the Subcommittee recommended that the Coast Guard not require propeller guards and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at A7-A8.

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting*

---

[5] "After considering the available data on propeller strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

In addition, although propellers "present the hazard of cutting wounds and penetration of the body," propeller "guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe." Subcommittee Report at 18-19. For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 17.

The Subcommittee Report also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or rings and held against the rotating propeller." *Id.* at 20-21.

of the National Boating Safety Advisory Council at 17-19 (Nov. 6-7, 1989) (R. Ex. 6). All 21 members of the Committee, representing state governments, boat manufacturers, and the interested public (see note 1, *supra)*, voted to adopt the Report and its conclusions and recommendations. *Id.* at 19; Pet. App. A8. The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. Subcommittee Report at 1.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. Pet. App. A9. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Ibid.* (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Ibid.*

In light of this extensive and uncontradicted record, the courts that have considered claims such as petitioners' on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the court concluded (*ibid.*; emphasis added):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's

adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 510 U.S. 815 (1993) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"). State courts have reached the identical conclusion. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa.Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

C. The Proceedings Below

In June 1993, petitioners' daughter "fell or was thrown" from the boat in which she was riding on Strom Thurmond Lake in Georgia. Pet. App. A3. She was struck in the head and body by the propeller of the boat's engine and died from her injuries. *Id.* at A3-A4. The engine, which was designed and manufactured by respondent Brunswick Corp., did not have a propeller guard. *Ibid.*

Petitioners "filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product." Pet. App. A4. Brunswick removed the case to federal court. *Ibid.* The district court granted Brunswick's motion for summary judgment on petitioners' state tort law claims, concluding that petitioners' claims were preempted by the Boat Safety Act. *Ibid.*

The court of appeals affirmed. Pet. App. A1-A25. The Eleventh Circuit held that petitioners common claims were not expressly preempted by § 4306 of the Boat Safety Act because of the presence of the "savings clause" in § 4311(g) of the Act. "[T]he savings clause indicates that at least some common law claims survive express preemption." *Id.* at A14. As a result, the court resolved its doubts about whether petitioners' claims

were expressly preempted "in favor of the narrow interpretation of the preemption clause and conclude[d] that the express preemption clause does not cover common law claims." *Ibid.*

The court of appeals nonetheless held that petitioners' common law claims were impliedly preempted by the statute: "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." Pet. App. A22. "Given that Congress intended for the [Boat Safety Act] to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements." *Id.* at A20.

REASONS FOR DENYING THE PETITION

After an extensive public investigation, the Coast Guard concluded that, for safety reasons, propeller guards should not be required on recreational boats. Petitioners seek to second-guess that federal determination and impose state law liability on respondent for not including a propeller guard on the boat that struck their daughter. This proposed common law rule, however, is plainly preempted by the Boat Safety Act, because it conflicts with and frustrates the purposes of the federal boat safety scheme established by Congress.

Virtually every court to consider the question has agreed with the courts below that common law claims such as petitioners' are preempted by the Boat Safety Act. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) Slip. Op. at 2 (S.D. Miss.

Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).[6]

Petitioners simply ignore these decisions interpreting the Boat Safety Act, which fully support the result in this case. Instead, they argue (Pet. 3-13) that the Eleventh Circuit's preemption holding conflicts with this Court's rulings in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992); *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); and *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996).

These purported conflicts, however, are wholly illusory. The Eleventh Circuit faithfully applied this Court's preemption jurisprudence in joining all of the other courts that have found

---

[6] In "the only case to reach a contrary conclusion," *Moss*, 915 F. Supp. at 186 n.2, the Texas Supreme Court held in *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994), that a "no-propeller-guard" tort claim was not preempted by the Boat Safety Act. The Texas court "recognize[d] that [its] holding conflicts" with a long line of federal and state court decisions. *Id.* at 252. Nonetheless, the court did not find these decisions "persuasive," in light of "the Supreme Court's apparent turn to stricter preemption analysis." *Ibid.* The "apparent turn" in preemption analysis was, in fact, the decision of the Eleventh Circuit in *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (1994), which misread this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), to "question[] the propriety of an implied preemption analysis when presented with an express preemption clause." 889 S.W.2d at 251 n.10.

This Court flatly repudiated the Eleventh Circuit's analysis in *Myrick*, holding that the presence of an express preemption clause "does not mean that the express clause entirely forecloses any possibility of implied preemption." 514 U.S. at 288. Thus, the continuing validity and relevance as a precedent of the decision in *Moore* is completely undermined. Perhaps for that reason, petitioners do not even cite it.

common law tort claims like petitioners' preempted by the Boat Safety Act. There is, therefore, no reason for this Court to grant the petition and review this straightforward issue on which the lower courts have spoken with one voice.

I. THE BOAT SAFETY ACT EVINCES NO CONGRESSIONAL INTENT TO PRECLUDE IMPLIED CONFLICT PREEMPTION OF COMMON LAW CLAIMS

The Eleventh Circuit held that "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the" Boat Safety Act (Pet. App. A22) and thus would frustrate the "'accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at A15, quoting *Myrick*, 514 U.S. at 287. *Petitioners make no effort to dispute that conclusion.* Instead, they assert (Pet. 3-6) that Congress intended to allow the states to frustrate the purposes of the Boat Safety Act by precluding the possibility of implied conflict preemption. Not surprisingly, they offer no evidence to support that remarkable assertion.

Relying on this Court's preemption analysis in *Cipollone*, 505 U.S. at 517-518, petitioners contend that the text of the Boat Safety Act alone provides a "reliable indicium of Congressional intent" to preclude implied conflict preemption of common law claims. Thus, petitioners assert that the absence of a reference to common law claims in the Act's preemption clause and the language of the "savings clause" in § 4311(g) (compliance with the Act "does not relieve a person from liability at common law") combine to show a congressional intent "to save common law liability from pre-emption." Pet. 6. Petitioners also invoke the "'assumption that the historic police powers of the States [a]re not to be superseded * * * unless that [i]s the clear and manifest purpose of Congress.'" Pet. 4 (quoting *Cipollone*, 505 U.S. at 517). Petitioners' analysis is flawed at every turn.

A. To begin with, as the Eleventh Circuit correctly noted (Pet. App. A15), there is no presumption against implied conflict preemption. Under the Supremacy Clause, "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder* v. *Casey*, 487 U.S. 131, 138 (1988) (citations omitted).

Moreover, the traditional presumption against express preemption of state regulation of health and safety matters is entirely misplaced in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.

B. Petitioners' argument (Pet. 4-6, 10-13) that the text of the Boat Safety Act's *express* preemption and "savings" clauses preclude *implied* conflict preemption of common law claims is also plainly wrong.

1. As the Eleventh Circuit concluded, "Congress' decision not to specify 'common law' in the preemption clause" does not demonstrate "congressional intent to save common law claims." Pet. App. A12. The Act's preemption clause in § 4306 preempts any state "law or regulation." The "overwhelming majority of courts" have held that Congress' use of "the terms 'law' and 'regulation' evidence[s] an intent to include common law claims" within the scope of federal preemption. Pet. App. A13.[7] This Court's precedents fully support that holding. See, *e.g.*, *Cipollone*, 504 U.S. at 519-524, 548-549; *CSX Transp.*,

[7] See, *e.g.*, *Carstensen*, 49 F.3d at 431-432; *Moss*, 915 F. Supp. at 186; *Davis*, 854 F. Supp. at 1580; *Shield*, 822 F. Supp. at 84; *Shields*, 776 F. Supp. at 1581; *Mowery*, 773 F. Supp. at 1017.

Inc. v. *Easterwood*, 507 U.S. 658, 661-676 (1993); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972).

Accordingly, petitioners cannot rely on "Congress' decision to forego listing 'common law' in the Boat Safety Act's Preemption Clause" (Pet. 5) as a basis on which to conclude that Congress intended to preclude implied preemption of common law claims.

2. Petitioners' reliance (Pet. 5, 10-13) on the Act's so-called "savings" clause, 46 U.S.C. § 4311(g), is also misplaced. That provision indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal safety standard.

Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by

preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these views. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-391 (1992); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). As these precedents indicate, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating a nationally uniform boat safety program, but rather to show Congress' intent not to preempt the remainder of the field of boat safety (such as safe boat operation and use, see note 2, *supra*) *not* covered by and *not* inconsistent with that federal program.[8]

---

[8] Petitioners contend that the Eleventh Circuit's decision in this case draws a spurious distinction between "torts of omission" and "torts of commission" (Pet. 11), and imposes liability on the latter but not the former. In fact, the Eleventh Circuit drew no such distinction but merely suggested that a manufacturer might be liable for negligently designing or manufacturing a safety device (Pet. App. A22). This suggestion is entirely consistent with the decisions of other courts under the Boat Safety Act. For example, in *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1989) (defective throttle), and *Rubin* v. *Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App. 1986) (defective seat), the courts held that common law claims based on defectively designed and installed equipment were not preempted by the Boat Safety Act. As (continued...)

Petitioners nevertheless assert that the savings clause can "be given full effect without frustrating congressional purposes, since neither the Boat Safety Act nor the Coast Guard require Brunswick to do anything whatsoever in regard to propeller guards." Pet. 10. This argument stands federal preemption law on its head. The Coast Guard determined after a lengthy administrative process that propeller guards should not be required because it would make boating *less* safe. In the face of this determination, petitioners have propounded a common law rule that would require manufacturers to install propeller guards or face potentially massive damages liability under state law. Petitioners' perverse reading of the "savings" clause, which would allow the states to overrule Coast Guard determinations, would cause the Act to "destroy itself."[9]

II. NEITHER THE ABSENCE OF A REGULATION ADOPTED UNDER THE ADMINISTRATIVE PROCEDURES ACT NOR THIS COURT'S DECISION IN *MYRICK* PRECLUDE IMPLIED PREEMPTION

Petitioners assert (Pet. 6-7) that the Coast Guard's decision not to require propeller guards is a "mere internal adoption of

---

[8] (...continued)
the Eighth Circuit observed in *Carstensen*, "common law claims asserting liability for defectively designed products that are actually installed may not be preempted." 49 F.3d at 432.

[9] Characterizing the Coast Guard's decision not to require propeller guards as an "option as a matter of implied federal regulation to either include guards or not" (Pet. 10) does not advance petitioners' case. This Court has long held that any state law that removes or restricts an option granted by federal regulation — as petitioners' proposed common law rule would in this case — conflicts with federal law and is preempted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982).

a recommendation [that] cannot have any pre-emptive effect as it does not meet the express requirements of either § 4302 of the Boat Safety Act, or the requirements of the Administrative Procedures Act." They further maintain that this Court's decision in *Myrick* compels this conclusion (*id.* at 8-10). These arguments are plainly wrong.

In light of the extensive Coast Guard proceedings, which included notice of public meetings in the Federal Register and a written ruling announcing the final agency decision, petitioners' assertion (Pet. 7) that the Coast Guard's decision not to regulate propeller guards was not the product of "a formal rulemaking process" is preposterous. The Coast Guard took pains to insure that the public was given an opportunity to participate in the rulemaking and was notified of its results (see pages 4-7, *supra*). Petitioners apparently would require the Coast Guard to take the senseless step of issuing a regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act (see note 15, *infra*) nor by preemption law generally. Petitioners cite no support for their illogical position.

This Court's decision in *Myrick* — which involved an entirely different statutory scheme and a regulatory vacuum on the safety issue raised — does not alter this conclusion. In *Myrick*, the Court interpreted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 ("Motor Vehicle Safety Act"),[10] and Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121 ("Standard 121"), adopted by the National Highway Traffic Safety Administration ("NHTSA"). The Motor Vehicle Safety Act has a preemption clause (15 U.S.C. § 1392(d)), which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

[10] The Motor Vehicle Safety Act was recodified at 49 U.S.C. §§ 30101-30169. We cite the prior codification on which the Court in *Myrick* relied.

Standard 121 at issue in *Myrick* "imposed stopping distances and vehicle stability requirements for trucks." 514 U.S. at 284. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Id.* at 285. On judicial review of Standard 121, the Ninth Circuit suspended the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 284 (quoting *Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distances and lock-up requirements no longer applied to trucks and trailers." 514 U.S. at 285.[11]

The plaintiffs in *Myrick* were involved in accidents with trucks manufactured by the defendants. The plaintiffs brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S.. at 283. The defendants contended that these tort claims were both expressly and impliedly preempted by the Motor Vehicle Safety Act, but this Court rejected those arguments.

[11] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 514 U.S. at 285 (citations omitted).

The Court began its analysis with the Motor Vehicle Safety Act's preemption clause, which "applies only '[w]henever a Federal motor vehicle safety standard * * * is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 514 U.S. at 286. Because "Standard 121 remains suspended," the Court concluded that "[t]here is simply no minimum objective standard stated at all," and the states were therefore free to adopt their own standards addressing the same issue. *Id.* at 286-287. Specifically, the Court found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes.*

Id. at 287 (emphasis added). Because the Court determined that there was no federal standard in effect, and that the absence of a standard did not indicate that federal authorities intended the area to be unregulated, it concluded that there was no express preemption and no implied conflict preemption (*id.* at 286-290).

This case is markedly different from *Myrick* in several critical respects. Here, unlike in *Myrick*, there *is* conclusive evidence that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 514 U.S. at 287. This was not, as petitioners suggest, a cavalier decision by the Coast Guard based on cursory "internal" deliberations. Pet. 7. The record to the contrary is overwhelming: a year-long investigation of propeller-strike incidents and data by a federal advisory committee (the Propeller Guard Subcommittee of the NBSAC), with nationwide public hearings and voluminous documentary evidence, culminating in a lengthy report recommending — *for reasons of safety* — that there should be "no regulatory action to require propeller guards." See pages 4-7, *supra*.

The Coast Guard, after reviewing the Report and all of the evidence accumulated by the NBSAC, independently concluded

that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." Pet. App. A9. As the court observed in *Stanley* v. *Bertram-Trojan, Inc.*, 855 F. Supp. 657, 658 (S.D.N.Y. 1994), "propeller guards were specifically considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it."

The Coast Guard's decision on grounds of safety not to require propeller guards was not, as petitioners would have it, "mere internal adoption of a recommendation" without more. Pet. 7. It was precisely the kind of federal "inaction *joined with action*" that this Court in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), held preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[12]

---

[12] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regu-

(continued...)

In this case, the Boat Safety Act and accompanying Coast Guard regulations — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — intentionally left propeller guards unregulated. In light of the voluminous record documenting the federal decision to leave propeller guards unregulated, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*[13]

In sum, this case is fundamentally different from *Myrick*, where there was no "affirmative decision of agency officials to refrain" from regulation. 514 U.S. at 287.[14] The Coast Guard made an "affirmative decision," based on considerations of safety, that propeller guards should *not* be required on recreational boats. The state law rule advocated by petitioners, which would mandate propeller guards, is preempted because it directly conflicts with and would severely frustrate the federal

---

[12] (...continued)
lation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

[13] Contrary to petitioners' assertion, the Eleventh Circuit did not decide that the mere "work of a study group, informal opinions or an agency decision to do nothing" always preempt state law. Pet. 13. In this case there was overwhelming evidence of an "affirmative decision" by an expert federal agency not to require propeller guards for safety reasons. See 514 U.S. at 287. As the court below stated, "in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards." Pet. App. A20.

[14] Indeed, in *Myrick* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. See page 17, *supra*. Clearly the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

policy adopted by the Coast Guard.[15]

* * * * *

In the final analysis, petitioners can offer no credible reason why this Court should review the decision below, which is fully consistent with *Myrick* and *Cipollone*, which follows a long line of federal and state court decisions finding preemption of identical claims under the Boat Safety Act, and which does not conflict with the decision of any other court.

Moreover, the Eleventh Circuit's conclusion that petitioners' claims are preempted is plainly correct. Petitioners seek to establish a state common law rule that would require propeller guards on all recreational boats. In support of this result, petitioners actually assert — contrary to common sense and good policy — that Congress intended to have lay juries establish national boat safety rules on a case-by-case basis through litigation (Pet. 12).

---

[15] Petitioners argue (Pet. 6-8) that Congress intended "that state law would only be pre-empted by 'regulations'" issued by the Coast Guard pursuant to the "formal rulemaking process" of the Administrative Procedures Act. In fact, the express preemption provision of the Boat Safety Act says exactly the opposite: state law is preempted unless it is "identical to a regulation prescribed by the Coast Guard" (46 U.S.C. § 4306).

Contrasting this language with the preemption clause interpreted in *Myrick* illustrates petitioners' fundamental misreading of both. The Motor Vehicle Safety Act preempts state law only when a federal safety standard "is in effect" (15 U.S.C. § 1392(d)). In *Myrick*, the absence of a federal regulation thus meant that the "States remain[ed] free to 'establish, or to continue in effect,' their own safety standards." 514 U.S. at 286. By contrast, the Boat Safety Act, read literally, provides that in the absence of a federal regulation the states are *not* free to regulate. (Here, of course, we have not just the mere absence of a federal regulation but the considered decision of the Coast Guard not to regulate, for reasons of safety.)

In the Boat Safety Act, however, Congress gave the Coast Guard plenary authority to set nationally uniform boat safety policy. In particular, the Coast Guard alone has been authorized to make the determination whether to require propeller guards on boats, and the Coast Guard expressly decided — after an exhaustive study — *not* to mandate that item of equipment. Petitioners' common law claim thus conflicts directly and substantially with this expert federal determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL J. CONNOLLY
Faegre & Benson
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

KENNETH S. GELLER*
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

**Counsel of Record*

OCTOBER 1997

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-288

In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

DAVID E. HUDSON*
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
Suite 700
SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481
Counsel for Petitioners

*Counsel of Record

KENNETH S. GELLER*
JOHN J. SULLIVAN
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613
Counsel for Respondent

*Counsel of Record

Petition For Writ Of Certiorari Filed: August 13, 1997
Writ Of Certiorari Granted: November 14, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
1.	District Court Docket Entries	1
2.	Eleventh Circuit Docket Entries	3
3.	Complaint	4
4.	Answer	14
5.	Joint Stipulation of Facts with Exhibits Thereto	29
	a. Exhibit 1 – Copy of letter from R.C. Hill, Chief, State Liaison and Compliance Division of the United States Coast Guard, to Mr. Orrin Lahman, Commissioner, New York State Parks and Recreation Authority, dated December 22, 1975	37
	b. Exhibit 2 – Copy of a Memorandum from A.T. Miles, Chief, Operator Compliance Branch of the United States Coast Guard, to Chief, State Liaison and Compliance Division of the United States Coast Guard, dated August 18, 1976	39
	c. Exhibit 3 – Copy of letter from O.W. Siler, Admiral, United States Coast Guard Commandant, to Mr. William Brey, Chief, Division of Law Enforcement, Illinois Department of Conservation, dated January 12, 1997	41
	d. Exhibit 4 – Copy of a Memorandum from G.H. Patrick Bursley, Chief Counsel, United States Coast Guard, to Chief, Office of Boating Safety of the United States Coast Guard, dated July 13, 1977	44

TABLE OF AUTHORITIES – Continued

Page

e. Exhibit 5 – Copy of the "Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Counsel," including all attachments thereto, dated November 7, 1989 46

f. Exhibit 6 – Copy of the Minutes of the National Boating Safety Advisory Counsel, Report of the Committee on Propeller Guards, dated November 6-7, 1989 103

g. Exhibit 7 – Copy of a letter from Robert T. Nelson, Rear Admiral, United States Coast Guard, Chief, Office of Navigation and Waterway Services, to Mr. A. Newell Garden, Chairman, National Boating Safety Advisory Counsel, dated February 1, 1990..... 163

h. Exhibit 8 – Copy of an article titled "Motorboat Propeller Injuries" prepared by Jon S. Vernick and Associates, The Johns Hopkins University Injury Prevention Center and Institute for Injury Reduction, dated September 1992..... 168

6. Decision Under Review: printed in *Petition for Writ of Certiorari*.....A1-A25

RELEVANT DOCKET ENTRIES

U.S. District Court
Southern District of Georgia (Augusta)

7/3/95	1	NOTICE OF REMOVAL by dft from the Superior Ct of Columbia Co, GA, to include cys of sheriff's entry of service, summons, complaint, ans of Brunswick, and ntc of filing; FILING FEE $ 120.00 receipt # 161742 (sda) [Entry date 07/07/95]
10/13/95	5	JOINT STIPULATION OF FACTS by plffs and dft (sda) [Entry date 10/16/95]
10/31/95	7	MOTION by Brunswick Corp. for Summary Judgment with brief in support. (sda) [Entry date 11/01/95]
10/31/95	8	MEMORANDUM of law by Brunswick Corp. in support of [7-1] motion for Summary Judgment by Brunswick Corp. (sda) [Entry date 11/01/95]
10/31/95	9	STATEMENT OF MATERIAL FACTS by defendant Brunswick Corp. in support of [7-1] motion for Summary Judgment by Brunswick Corp. (sda) [Entry date 11/01/95]
11/20/95	11	BRIEF/MEMORANDUM by Vicky Lewis, Gary Lewis in opposition to [7-1] motion for Summary Judgment by Brunswick Corp. (sda) [Entry date 11/21/95]
12/12/95	16	REPLY/RESPONSE by defendant Brunswick Corp. to plffs' [11-1] opposition brief/memorandum to dft's motion for summary jugmt (sda)

12/13/95	17	NOTICE OF FILING of supplemental authority by Vicky Lewis, Gary Lewis in opposition to summary judgment (sda)
1/22/96	18	ORDER granting dft's [7-1] motion for Summary Judgment; clerk instructed to close case and enter final judgment in favor of dft, taxing costs against plffs; (signed by Judge Dudley H. Bowen Jr.); copies served (sda) [Entry date 01/23/96]
1/22/96	19	JUDGMENT for Brunswick Corp. in accordance with Order of Ct entered 1/22/96, granting dft's motion for summary jgmt; costs shall be assessed agnst plffs and taxed by Clerk of Ct; copies served. (sda) [Entry date 01/23/96]
1/29/96	20	NOTICE OF APPEAL by Vicky Lewis, Gary Lewis to the US Ct of App. 11th Cir, from order granting dft's mot for sum jgmt entered on 1/22/96. FILING FEE $105; RECEIPT # 166770; copies served; [19-1] judgment order, [18-1] order (sda) [Entry date 01/30/96]

ELEVENTH CIRCUIT

8. OPINION INFORMATION – Pub XXX NonPub ___

3/21/97 Opinion Issued

[X] Affirmed [EEC] Signed

10. REHEARING INFORMATION

4/11/97 Petition for Rehearing (J) 4/14/97

Apt X Ape _ Panel X En Banc X

5/15/97 Order Denying Rehearing

IN THE SUPERIOR COURT OF COLUMBIA COUNTY
STATE OF GEORGIA

VICKY LEWIS AND GARY LEWIS, individually, as parents, as nest friends and as administrator of the estate of KATHRYN C. LEWIS,	)	Civil Action File No. CV95-277
Plaintiffs,	)	COMPLAINT FOR DAMAGES
v.	)	
BRUNSWICK CORP.,	)	(Filed June 2, 1995)
Defendant.	)	

NOW COME Vicky Lewis and Gary Lewis, as individuals, parents, next friends and administrator of the estate of Kathryn C. Lewis (hereinafter "Kathee Lewis"), deceased, and shows the following in support of their Complaint for damages:

THE PARTIES

1. Gary and Vicky Lewis are residents of Healdton, Oklahoma, and are the parents of Kathee Lewis. Vicky Lewis is also the duly appointed administrator of the Estate of Kathee Lewis.

2. Defendant Brunswick Corp. is a Delaware corporation registered to do business in Georgia. The registered agent for Defendant Brunswick Corp. is C.T. Corporations System, 1201 Peachtree Street, N.E., Atlanta, Georgia 30361, and Defendant Brunswick Corp. may be served with legal process through said agent at said address.

3. Defendant Brunswick Corp. has in the past and still does engage in a continuous, systematic and substantial course of doing business in Georgia, including the sale of its outboard and other boat and marine products through authorized dealers and dealerships located throughout Georgia and Columbia County.

4. Jurisdiction and venue are properly laid in this Court under the Georgia Long-Arm Statute.

OPERATIVE FACTS

5. On June 6, 1993, at approximately 4:36 p.m., Kathee Lewis was a passenger in a motorized boat in Columbia County, Georgia.

6. The area, place and location at which Kathee Lewis and her friends were boating was a place normally, frequently, and customarily used by water-skiers and boaters for leisure, water-time recreational activities.

7. On the date and at the time and place stated above, Ralph Coffman was operating a 17 foot 5 inch fiberglass hull open motor boat which was powered by a 75 horsepower Mariner outboard engine manufactured by the Defendant Brunswick Corp. in 1987.

8. Kathee Lewis was ejected from the boat into the water when the boat struck wake, and Kathee came in contact with the rapidly rotating propeller blades on the outboard motor manufactured by Defendant Brunswick Corp.

9. The rotating propeller blades repeatedly struck Kathee Lewis on her body, causing numerous severe lacerations and extensive chop wounds to the head, face, neck, upper extremity and lower extremity of the body from which she died.

10. Kathee Lewis was pronounced dead at the scene by the Columbia County Coroner. She was 19 years old, and died without leaving a child or spouse.

COUNT I

11. Defendant Brunswick Corp. is a manufacturer and merchant seller of marine products, including outboard motors, and it was the manufacturer and merchant seller of the above-stated outboard motor used to power the boat, the propeller of which struck and killed the decedent Kathee Lewis.

12. It is averred that for several years prior to the date on which Defendant Brunswick Corp. designed, manufactured, assembled and sold the above-stated outboard motor it knew that it was foreseeable and inevitable that swimmers, water-skiers, and other persons lawfully and properly in, or accidentally ejected into, the waters near pleasure craft would be struck and either severely injured or killed by rotating propeller blades on outboard motors manufacturer, designed, assembled, and sold by the Defendant Brunswick Corp.

13. It is averred that for several years prior to the date on which it designed, manufactured, assembled, and sold said outboard motor, Defendant Brunswick Corp. had the expertise, experience, trained engineering staff, and economic ability to design and install on outboard motors manufactured by it a technologically feasible people-protective propeller guard, ring, shroud, nozzle, or other device which was capable of preventing the rotating propeller blades from striking swimmers, water-skiers, and other innocent persons lawfully and properly in the water or accidentally thrown into the water in a manner similar to that of decedent Kathee Lewis in this case.

14. It is averred that a properly designed propeller guard of the kind referred to above would have substantially reduced or eliminated the severe injuries sustained by decedent Kathee Lewis in the above-stated accident, would have saved her life, and would have caused only minor, non-life-threatening injuries.

15. Kathee Lewis sustained enhanced injuries, this is, her death, as a direct and proximate result of the absence of said propeller guard.

16. It is further averred that Defendant Brunswick Corp. for several years prior to the date on which it designed, assembled, manufactured, and sold the outboard motor in question, had the experience, expertise, trained engineering staff, and economic ability to design and install a technologically feasible people-protective propeller guard, ring shroud, nozzle, or other device which would not only substantially reduce the risk of injury and death, but could do so at minimal cost and without substantially impairing the hydro-dynamic performance characteristics or usefulness of the outboard motors to perform their intended functions.

17. It is averred that Defendant Brunswick Corp. acting by and through its agents and employees, all of whom were acting within the course and scope of their employment for Defendant Brunswick Corp. were negligent and that its negligence consisted of the following:

    a. failing to design, assemble, manufacture, and install a propeller guard, ring, shroud, nozzle, or other device on the outboard motor manufactured and sold by it so as to prevent the rotating propeller blades on said outboard motor from striking decedent Kathee Lewis;

b. failing to give due, adequate, and proper regard to the rights and position of decedent Kathee Lewis, Vicky Lewis and Gary Lewis as stated herein;

c. failing to recall outboard motors manufactured by it and not producing a propeller guard of the kind referred to above;

d. making a conscious design decision to manufacture and market an unreasonable dangerous product, to wit, outboard motors with unprotected propellers, when it knew that said unprotected propellers were causing serious injuries and death, and when it further knew that such injuries could be avoided and prevented by use of a propeller guard; and

e. making a conscious design decision to manufacture and market an unreasonably dangerous product, to wit, outboard motors with unprotected propellers, because installation of people-protective propeller guards might interfere with Defendant Brunswick Corp,'s profits resulting from the sale of replacement propellers as well as potentially interfere with the sale of larger, more expensive, and faster motors.

18. As a direct and proximate result of the negligence of Defendant Brunswick Corp. as referred to above, decedent Kathee Lewis sustained enhanced injuries which she would not otherwise have sustained in the accident in question but for the negligence of the Defendant Brunswick Corp. in failing to incorporate a people-protective propeller guard into the design of its outboard motors, which enhanced injuries directly and proximately caused decedent Kathee Lewis' death.

19. As a direct and proximate result of the negligent conduct of Defendant Brunswick Corp. as referred to above, decedent Kathee Lewis suffered severe, excruciating, and unrelentingly painful injuries on June 6, 1993, from which she died as a result thereof.

20. Vicky Lewis and Gary Lewis, as parents, as next friends, individually and as executor of the estate of decedent Kathee Lewis, are entitled to recover the full value of the life of their deceased daughter Kathee Lewis under the Georgia Wrongful Death Act, O.C.G.A. § 51-4-4.

21. By reason of the death of decedent Kathee Lewis, Vicky and Gary Lewis have suffered substantial pecuniary losses including (but not limited to) the loss of contributions, service, aid, association, support, protection, comfort, care, and society, as well as funeral expenses, by reason of her death.

22. Defendant Brunswick Corp. is liable to Vicky and Gary Lewis under the Georgia Wrongful Death Act for the full value of the life of Kathee Lewis, which was tragically and abruptly shortened due to the negligence and defective product of Defendant Brunswick Corp. as set forth herein. The amount of this liability is to be determined by the enlightened conscience of an impartial jury.

COUNT II

23. Plaintiffs incorporate by reference hereto all of the allegations of Paragraphs 1 through 22 of this Complaint as if set forth fully herein.

24. As a direct and proximate result of the negligent and tortious conduct of Defendant Brunswick Corp. as referred to above, decedent Kathee Lewis sustained

severe, unrelenting, and excruciatingly painful injuries which caused her great conscious pain and suffering and resulted in her death on June 6, 1993.

25. As a further direct and proximate result of the negligent and tortious conduct of Defendant Brunswick Corp. as referred to above, decedent Kathee Lewis has been deprived of the gross earnings which she would have made from the date of her injury throughout the balance of her estimated working life expectancy.

26. Defendant Brunswick Corp. is liable to Vicky and Gary Lewis for all damages sustained by the estate of Kathee Lewis, including damages for her unrelenting and excruciating conscious pain and suffering, and loss of gross earnings over the rest of her working life expectancy in an amount to be determined by the enlightened conscience of an impartial jury.

COUNT III

27. Plaintiffs incorporate by reference hereto all of the allegations contained in Paragraphs 1 through 26 of this Complaint as if set forth fully herein.

28. It is averred that the conduct of Defendant Brunswick Corp. acting by and through its agents and employees, and within the scope of its authority, was willful, malicious, intentional, or alternatively, grossly reckless and negligent, and in callous disregard of the outcome and consequences of such action in that:

    a. Defendant Brunswick Corp. for many years prior to the date of the accident in this case, had the knowledge to design into its outboard motor systems a technologically feasible and not costly people-protective propeller-guard system which

would reduce the harm from foreseeable propeller injuries but chose instead to consciously disregard such technology in order to enhance its profits in marketing and merchandising of its motors and accessory parts, including its replacement propellers and motors, without such people-protective devices;

    b. Defendant Brunswick Corp. has engaged in wrongful conduct intended to suppress the production and availability of guards built by third persons; and

    c. Defendant Brunswick Corp. has falsely and fraudulently exaggerated performance differences between a boat and motor with and without a propeller guard.

29. It is averred that the conduct of Defendant as set forth above has been carried out in an attempt to suppress the availability of methods for preventing propeller injuries in order to protect its product liability exposure, all in conscious disregard of the welfare of members of the public engaged in boating and recreational water activity.

30. Vicky and Gary Lewis demand punitive damages against Defendant Brunswick Corp. on this Count III of the Complaint for such sum as an enlightened and impartial jury finds will adequately punish Defendant Brunswick Corp. and serve as a deterrent to others who would commit similar acts in the future.

COUNT IV

31. Plaintiffs incorporate by reference hereto all of the allegations of Paragraphs 1 through 30 of this Complaint as if set forth fully herein.

32. Defendant Brunswick Corp. designed, manufactured, assembled, and sold a defective and defectively designed product which was unreasonably dangerous and which was a substantial factor in causing enhanced injuries to the decedent Kathee Lewis, to wit, her death, which could have been avoided with only minor, non-life-threatening, non-disabling injuries being sustained by her if a people-protective propeller guard had been designed into the product in question.

33. Vicky and Gary Lewis demand judgment against Defendant Brunswick Corp. in a sum to be determined by the enlightened conscience of an impartial jury which will serve as adequate compensation for the above-stated loss and damages resulting from the defective product manufactured and marketed by Defendant Brunswick Corp.

WHEREFORE Plaintiffs Vicky Lewis and Gary Lewis, individually, as parents, as next friends and as administrator of the estate of Kathryn C. Lewis pray as follows:

a. That this Complaint be served on Defendant Brunswick Corp. as provided by law;

b. That Vicky and Gary Lewis recover from Defendant Brunswick Corp. the full value of the life of Kathee Lewis, including but not limited to the loss of Kathee Lewis' gross earnings over the rest of her working life expectancy (reduced to present value);

c. That Vicky and Gary Lewis recover from Defendant Brunswick Corp. damages for the pain and suffering inflicted upon Kathee Lewis;

d. That Vicky and Gary Lewis recover from Defendant Brunswick Corp. all other damages caused by the defective product manufactured and sold

by Defendant Brunswick Corp. and the negligence of Defendant Brunswick Corp.;

e. That Vicky and Gary Lewis recover from Defendant Brunswick Corp. punitive damages to deter Defendant Brunswick Corp. and others from committing similar wrongs; and

f. That this Court order such other relief as it deems fit, just and proper.

This 2nd day of June, 1995.

David E. Hudson
William J. Keogh, III

HULL, TOWILL, NORMAN & BARRETT
Post Office Box 1564
Augusta, Georgia 30903
(706) 722-4481

R. Ben Hogan, III

HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203-3758

By: /s/ David E. Hudson
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF COLUMBIA COUNTY
STATE OF GEORGIA

VICKY LEWIS and GARY LEWIS, Individually, as Parents, as Next Friends, and as Administrator of the Estate of Kathryn C. Lewis,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. CV95-277
BRUNSWICK CORP.,	)	
Defendant.	)	

ANSWER OF BRUNSWICK CORPORATION

COMES NOW Brunswick Corporation ("Brunswick"), Defendant in the above-captioned action, and for its Answer to Plaintiffs' Complaint, states as follows:

FIRST DEFENSE

Neither Plaintiffs' Complaint as a whole nor any part thereof states a claim against Brunswick upon which relief can be granted.

SECOND DEFENSE

Brunswick responds to the numbered paragraphs of Plaintiffs' Complaint as follows:

THE PARTIES

1.

Brunswick is without knowledge of information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 1 of Plaintiffs' Complaint, which therefore stand denied.

2.

Brunswick admits the allegations contained within Paragraph No. 2 of Plaintiffs' Complaint.

3.

In response to Paragraph No. 3 of Plaintiffs' Complaint, Brunswick admits only that it conducts business in Georgia, including Columbia County, by selling marine products to certain marine product dealers and/or retailers in Georgia, including Columbia County, but Brunswick denies as pled the remaining allegations contained within Paragraph No. 3 of Plaintiffs' Complaint.

4.

Brunswick admits the allegations within Paragraph No. 4 of Plaintiffs' Complaint that jurisdiction is proper in this Court, but denies the remaining allegations contained within Paragraph No. 4 of Plaintiffs' Complaint.

ALLEGED OPERATIVE FACTS

5.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 5 of Plaintiffs' Complaint, which therefore stand denied.

6.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 6 of Plaintiffs' Complaint, which therefore stand denied.

7.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 7 of Plaintiffs' Complaint, which therefore stand denied.

8.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 8 of Plaintiffs' Complaint, which therefore stand denied.

9.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations

contained within Paragraph No. 9 of Plaintiffs' Complaint, which therefore stand denied.

10.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 10 of Plaintiffs' Complaint, which therefore stand denied.

COUNT I

11.

Brunswick admits that it is a manufacturer of marine products, including outboard motors, but Brunswick is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained within Paragraph No. 11 of Plaintiffs' Complaint, which therefore stand denied.

12.

Brunswick is without knowledge or information sufficient to form a belief as to the allegation contained within Paragraph No. 12 of Plaintiffs' Complaint that Brunswick designed, manufactured, and/or sold the outboard motor allegedly involved in the accident described in Plaintiffs' Complaint, which therefore stands denied. Brunswick admits that it has designed, manufactured, assembled, and/or sold outboard motors which can be used with an exposed propeller that could foreseeably cause injury to any person who came in contact with the propeller when rotating. Brunswick denies any remaining

allegations contained within Paragraph No. 12 of Plaintiffs' Complaint.

13.

Brunswick denies the allegations contained within Paragraph No. 13 of Plaintiffs' Complaint.

14.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 14 of Plaintiffs' Complaint, which therefore stand denied.

15.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 15 of Plaintiffs' Complaint, which therefore stand denied.

16.

Brunswick denies the allegation contained within Paragraph No. 16 of Plaintiffs' Complaint.

17.

Brunswick denies the allegations contained within Paragraph No. 17 of Plaintiffs' Complaint, including all subparts thereof.

18.

Brunswick denies the allegations contained within Paragraph No. 18 of Plaintiffs' Complaint.

19.

Brunswick denies the allegations contained within Paragraph No. 19 of Plaintiffs' Complaint.

20.

Brunswick denies the allegations contained within Paragraph No. 20 of Plaintiffs' Complaint.

21.

Brunswick is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph No. 21 of Plaintiffs' Complaint, which therefore stand denied. Brunswick denies that it is liable to Plaintiffs for the damages alleged in Paragraph No. 21 of Plaintiffs' Complaint.

22.

Brunswick denies the allegations contained within Paragraph No. 22 of Plaintiffs' Complaint.

COUNT II

23.

Brunswick hereby expressly incorporates by reference its responses to Paragraph Nos. 1 through 22 of Plaintiffs' Complaint as though set forth verbatim herein.

24.

Brunswick denies the allegations contained within Paragraph No. 24 of Plaintiffs' Complaint.

25.

Brunswick denies the allegations contained within Paragraph No. 25 of Plaintiffs' Complaint.

26.

Brunswick denies the allegations contained within Paragraph No. 26 of Plaintiffs' Complaint.

COUNT III

27.

Brunswick hereby expressly incorporates by reference its responses to Paragraph Nos. 1 through 26 of Plaintiffs' Complaint as though set forth verbatim herein.

28.

Brunswick denies the allegations contained within Paragraph No. 28 of Plaintiffs' Complaint, including all subparts thereof.

29.

Brunswick denies the allegations contained within Paragraph No. 29 of Plaintiffs' Complaint.

30.

Brunswick objects that Paragraph No. 30 of Plaintiffs' Complaint contains only a prayer for damages and does not contain allegations which require a response. In any event, Brunswick denies that it is in any way liable for the damages prayed for in Paragraph No. 30 of Plaintiffs' Complaint and denies any and all allegations contained therein.

COUNT IV

31.

Brunswick hereby expressly incorporates by reference its responses to Paragraph Nos. 1 through 30 of Plaintiffs' Complaint as though set forth verbatim herein.

32.

Brunswick denies the allegations contained within Paragraph No. 32 of Plaintiffs' Complaint.

33.

Brunswick objects that Paragraph No. 33 of Plaintiffs' Complaint contains only a prayer for damages and does not contain allegations which require a response. In any event, Brunswick denies that it is in any way liable for the damages prayed for in Paragraph No. 33 of Plaintiffs' Complaint and denies any and all allegations contained therein.

34.

Brunswick denies each and every allegation contained in Plaintiffs' Complaint not specifically admitted to above.

THIRD DEFENSE

Plaintiffs' claims, if any exist at law, are barred as a result of Plaintiffs' decedent's failure to exercise ordinary and due care for her own safety and protection, and said failure to exercise ordinary care was the sole proximate cause of any injuries allegedly sustained by Plaintiffs' decedent and Plaintiffs.

FOURTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred because any injury or damage allegedly sustained by Plaintiffs or their decedent was the direct and proximate result of negligence on Plaintiffs' decedent's part which was equal to or greater than any negligence on the part of

Brunswick. Brunswick specifically denies that it was negligent or is liable in any way for Plaintiffs' alleged damages.

FIFTH DEFENSE

Although Brunswick expressly denies that it or any of its agents were negligent in any way whatsoever, Plaintiffs' decedent's own negligence contributed to the injuries and damages alleged sustained by Plaintiffs. Such damages must, therefore, be reduced in proportion to the amount of Plaintiffs' decedent's negligence.

SIXTH DEFENSE

Plaintiffs' claims, if any exist at law, are bared by reason of the fact that the incident described in Plaintiffs' Complaint and any and all alleged damages resulting therefrom are the sole proximate result of the negligence of third parties over whom Brunswick exercises no control and for whom it is not liable or responsible.

SEVENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred under the doctrine of assumption of risk.

EIGHTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred because the dangers complained of, if any exist, are open and obvious to ordinary consumers.

NINTH DEFENSE

Plaintiffs' claim, if any exist at law, are barred because the products described in Plaintiffs' Complaint are neither defective nor negligently designed, and are fit for use according to the reasonable expectations of ordinary consumers.

TENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred by Plaintiffs' failure to support their complaint with an affidavit as required by O.C.G.A. § 9-11-9.1.

ELEVENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred by the applicable statutes of limitations and repose.

TWELFTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred under the doctrine of Federal Preemption.

THIRTEENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred because there was and is no safe and feasible propeller guarding device available.

FOURTEENTH DEFENSE

Although Brunswick denies that it is liable to Plaintiffs in any manner whatsoever, Brunswick is entitled to a

reduction in any judgment recovered herein to reflect any amount that Plaintiffs have or may recover from the driver of the boat at issue in this lawsuit or any other persons or entities alleged to have been at fault in the accident at issue herein.

FIFTEENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred under the doctrines of release, estoppel, and waiver.

SIXTEENTH DEFENSE

Plaintiffs' claim for punitive damages, if it exists at law, is barred because the facts alleged in Plaintiffs' Complaint are insufficient to support the imposition of punitive or exemplary damages under applicable law.

SEVENTEENTH DEFENSE

Plaintiffs' claim for punitive damages, if it exists at law, is barred by reason of the fact that the imposition of punitive or exemplary damages on the facts alleged in Plaintiffs' Complaint would violate the due process and excessive fines clauses of the United States and Georgia Constitutions.

EIGHTEENTH DEFENSE

Plaintiffs' claims, if any exist at law, are barred under the doctrine of payment and accord and satisfaction, Plaintiffs having already recovered full compensation for their alleged damages.

WHEREFORE, having fully responded to each and every allegation contained in Plaintiffs' Complaint, Brunswick prays for the following relief on the basis of its Answer:

(a) That Brunswick have judgment on the Complaint and that Plaintiffs take nothing thereunder;

(b) That all costs of this action be assessed against Plaintiffs; and

(c) That Brunswick have such other and further relief as the Court may deem just and proper.

Respectfully submitted this 3rd day of July, 1995.

By: /s/ Ronald L. Reid (w/perm. by J.W.H.)
RONALD L. REID
Georgia State Bar No. 600100

By: /s/ James W. Hagan
JAMES W. HAGAN
Georgia State Bar No. 316668

ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

By: /s/ Thomas W. Tucker
THOMAS W. TUCKER
Georgia State Bar No. 717975

DYE, TUCKER, EVERITT, WHEALE
& LONG
453 Greene Street
P.O. Box 2426
Augusta, Georgia 30903
(706) 722-0771

Attorneys for Defendant
Brunswick Corporation

IN THE SUPERIOR COURT OF COLUMBIA COUNTY
STATE OF GEORGIA

VICKY LEWIS and GARY LEWIS, Individually, as Parents, as Next Friends, and as Administrator of the Estate of Kathryn C. Lewis,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. CV95-277
BRUNSWICK CORP.,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the within and foregoing "ANSWER OF BRUNSWICK CORPORATION" upon counsel, by placing same in United States Mail, postage prepaid, and addressed as follows:

David E. Hudson, Esq.
William J. Keogh III
HULL, TOWILL, NORMAN & BARRETT
Post Office Box 1564
Augusta, Georgia 30903

R. Ben Hogan III
HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203-3758

This 3rd day of July, 1995.

/s/ Thomas W. Tucker
THOMAS W. TUCKER
Georgia State Bar No. 717975

DYE, TUCKER, EVERITT, WHEALE
& LONG
453 Greene Street
Augusta, GA 30903
(706) 722-0771

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

VICKY LEWIS and GARY LEWIS, individually as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS, Plaintiffs, v. BRUNSWICK CORP., Defendant.	CIVIL ACTION FILE NO. CV 195-096 (Filed Oct. 13, 1995)

PLAINTIFFS' AND DEFENDANT'S JOINT STIPULATION OF FACTS

COME NOW Plaintiffs and Defendant and stipulate the following facts in connection with the adjudication of all claims in the above-captioned action.

1.

Exhibit "1" hereto is a true, correct, and authentic copy of a letter from R. C. Hill, Chief, State Liaison and Compliance Division of the United States Coast Guard, to Mr. Orrin Lahman, Commissioner, New York State Parks and Recreation Authority, dated December 22, 1975.

2.

Exhibit "2" hereto is a true, correct, and authentic copy of a Memorandum from A. T. Miles, Chief, Operator

Compliance Branch of the United States Coast Guard, to Chief, State Liaison and Compliance Division of the United States Coast Guard, dated August 18, 1976.

3.

Exhibit "3" hereto is a true, correct, and authentic copy of a letter from O. W. Siler, Admiral, United States Coast Guard Commandant, to Mr. William Brey, Chief, Division of Law Enforcement, Illinois Department of Conservation, dated January 12, 1977.

4.

Exhibit "4" hereto is a true, correct, and authentic copy of a Memorandum from G. H. Patrick Bursley, Chief Counsel, United States Coast Guard, to Chief, Office of Boating Safety of the United States Coast Guard, dated July 13, 1977.

5.

Exhibit "5" hereto is a true, correct, and authentic copy of the "Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council," including all attachments thereto, dated November 7, 1989.

6.

Exhibit "6" hereto is a true, correct, and authentic copy of the Minutes of the National Boating Safety Advisory Council, Report of the Committee on Propeller Guards, dated November 6-7, 1989.

7.

Exhibit "7" hereto is a true, correct, and authentic copy of a letter from Robert T. Nelson, Rear Admiral, United States Coast Guard, Chief, Office of Navigation and Waterway Services, to Mr. A. Newell Garden, Chairman, National Boating Safety Advisory Council, dated February 1, 1990.

8.

Exhibit "8" hereto is a true, correct, and authentic copy of an article titled "Motorboat Propeller Injuries" prepared by Jon S. Vernick and Associates, The Johns Hopkins University Injury Prevention Center and Institute for Injury Reduction, dated September 1992.

9.

Exhibit "9" hereto is a true, correct, and authentic copy of the deposition of Jim Getz dated February 9, 1990 and taken in connection with a case filed in The United States District Court for the Northern District of Alabama, Middle Division, *Beech v. Outboard Marine Corporation*, Civil Action File No. CV-89-AR-0789-M, excluding two exhibits, true and correct copies of which are attached as Exhibits "6" and "7" hereto.

10.

Although Plaintiff does not stipulate that these documents have any preemptive force or effect with regard to her claims, the parties stipulate that Exhibits "1" through "7" hereto are true, accurate, and authentic copies of

official records of the United States Coast Guard, and that Exhibits "5"-"7" reflect the Coast Guard's official communications with regard to whether marine manufacturers of outboard motors which utilize open-screw propellers should equip such motors with "guards," shrouds, or other similar protective devices, and shall be admitted as evidence in connection with consideration of Brunswick's Motion for Summary Judgment on the basis of preemption and at all stages of the above-captioned lawsuit, including at trial.

11.

The parties stipulate, solely for purposes of adjudicating Brunswick's Motion for Summary Judgment on the basis of federal preemption, that Plaintiffs' decedent, Vicky Lewis, died as a result of injuries she sustained on June 6, 1993, when she fell overboard out of a boat being operated on Strom Thurmond Lake near the Fort Gordon Recreational Area; and that the operator of the boat, Ralph Coffman, was maneuvering the boat into a right-hand turn while pulling his son on an inner-tube behind the boat when Ms. Lewis fell from the port side of the boat.

12.

Plaintiffs contend that Ms. Lewis died as a result of injuries sustained when she fell out of the boat and was allegedly struck by the propeller of the outboard engine installed on the boat. The parties stipulate, solely for purposes of consideration of Brunswick's Motion for Summary Judgment on the basis of federal preemption,

that Ms. Lewis was struck by the propeller. The parties agree that Brunswick reserves its right to contest the issue of whether Ms. Lewis was struck by the propeller at all, the extent of any injuries Ms. Lewis may have received as a result of contact with the boat's propeller, and/or whether Ms. Lewis' fatal injuries resulted from contact with the propeller. That is, the parties agree that this stipulation shall be of no evidentiary effect in any trial of this matter or in connection with any motion other than Brunswick's Motion for Summary Judgment on the basis of federal preemption.

13.

According to a Columbia County Sheriff's Department incident report, the boat involved in the accident was equipped with a 1987 model Mariner 75 horsepower outboard motor. The parties stipulate, solely for purposes of adjudicating Brunswick's Motion for Summary Judgment on the basis of preemption, that Brunswick either manufactured or marketed 1987 model mariner brand 75 horsepower outboard motors; that 1987 model mariner brand outboard motors were designed and manufactured to be equipped with open-screw propellers; and were not equipped with "guards" or other devices that would shroud or otherwise encase propellers installed on 1987 model Mariner brand outboard motors. The parties stipulate, solely for purposes of adjudicating Brunswick's Motion for Summary Judgment on the basis of federal preemption, that Brunswick manufactured the outboard motor involved in the accident at issue in this lawsuit. The parties agree that Brunswick reserves its right to contest the issue of whether or not Brunswick either

manufactured, marketed, or sold the motor involved in the accident at issue in this lawsuit. That is, the parties agree that this stipulation shall be of no evidentiary effect in any trial of this matter or in connection with any motion other than Brunswick's Motion for Summary Judgment on the basis of federal preemption.

STIPULATED TO by and on behalf of Brunswick Corporation this 10th day of October, 1995.

/s/ James W. Hagan
RONALD L. REID
Georgia Bar No. 600100
JAMES W. HAGAN
Georgia Bar No. 316668

Counsel for Brunswick Corporation

ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000

STIPULATED TO by and on behalf of Plaintiffs this 13th day of October, 1995.

/s/ William J. Keogh III
DAVID E. HUDSON
Georgia Bar No. 374450
WILLIAM J. KEOGH, III
Georgia Bar No. 415781

Counsel for Plaintiffs

HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564
Augusta, GA 30903

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

VICKY LEWIS and GARY LEWIS, individually as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS, Plaintiffs, v. BRUNSWICK CORP., Defendant.	)	CIVIL ACTION FILE NO. CV 195-096

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the within and foregoing "Plaintiffs' and Defendant's Joint Stipulation of Facts" upon all counsel of record by placing same in U.S. mail, postage pre-paid and addressed as follows:

David E. Hudson
William J. Keogh, III
Hull, Towill, Norman & Barrett
P.O. Box 1564
Augusta, Georgia 30903
706/722-4481

R. Ben Hogan, III
Hogan, Smith & Alspaugh
2323 Second Avenue North
Birmingham, AL 35203-3758

This 10th day of October, 1995.

/s/ James W. Hagan
JAMES W. HAGAN

ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000

EXHIBIT 1

22 DEC 1975

Mr. Orin Lahman
Commissioner, New York State Parks
and Recreation
Agency Building
Empire State Plaza
Albany, New York 12238

Dear Mr. Lahman:

In my letter of 24 October 1975 concerning the recodification of New York's Navigation Law, I noted that the matter of Federal preemption of State associated equipment requirements would be discussed at the November 1975 meeting of the National Association of State Boating Law Administrators (NASBLA). As you know, we did discuss the matter, and the proposals noted in the attached informal report were left for NASBLA to consider. I have asked Mr. Fullwood, President of NASBLA, to provide the Coast Guard with NASBLA's positions on preemption. We will withhold a final decision on this matter until such time as Mr. Fullwood responds and we have had an opportunity to work out any differences.

In the meantime, those provisions of your Navigation Law concerning a whistle for boats under 16 feet in length, anchors, distress flag and night flares are in excess to Federal requirements and are subject to preemption. I request that you not enforce those provisions pending the Coast Guard's final action on preemption. Your cooperation in this regard is earnestly solicited for the sake of uniformity of boating laws and regulations among the Federal government and the States.

Thank you for your efforts and cooperation to date in this matter. Please feel free to call upon me if I can be of further assistance.

Sincerely,

R.C. Hill
Illegible U.S. Coast Guard
Chief State Liaison & Compliance Division
Office of Boating Safety
Commission of the Commandant

EXHIBIT 2

UNITED STATES GOVERNMENT
Memorandum

DATE 18 AUG 1976

SUBJECT: Comparison of State vs. Federal Equipment Requirements

FROM: Chief, Operator Compliance Branch

TO: Chief, State Liaison and Compliance Division

1. Enclosures (1) and (2) were prepared as a result of a thorough review by this Branch of State Boating Laws. The Laws are current insofar as we could determine. Where there was a question in this regard, the State was contacted for clarification. Though not all items are classified as "Associated Equipment", the following were addressed as State required excess equipment/operator requirements:

*a. Secondary Propulsion
*b. Bailer
*c. Anchor
d. Line
*e. Distress Signals
f. Battery Shield
g. Murrier
h. Use of Siren
i. Use of Blue Light
j. Yearly Inspection
*k. Personal Flotation Devices
*l. Fire extinguishers

The items preceded by "*" are considered as associated equipment for the purposes of the Federal Preemption issue.

2. Enclosure (3) is a copy of the Project Request Memorandum addressing the Termination of Exemption to Federal Preemption issued on 14 March 1973. Paragraph 1.d., of the PRM lists those States and specific items of equipment which are considered to fall within the definition of associated equipment, and which, under Section 10 of FBSA '71, are subject to Federal Preemption.

3. Particular care has been taken to give the States the benefit of the doubt whenever their laws were hazy, not well defined, or not in strict conformance with the wording of Federal Regulations. For example, if a State required fire extinguishers to be carried "on all boats according to regulations of the Coast Guard", the State was considered to be in compliance. If a State required fire extinguishers to be carried on all motorboats, less the wording "according to regulations of the Coast Guard", that State was considered to require excess equipment.

/s/ A. T. Miles
A. T. MILES

Encl: (1) Listing of State required additional equipment other than PFD's and fire extinguishers

(2) Listing of PFD and fire extinguisher requirements

(3) Copy PRM on Termination of Exemption to Preemption

EXHIBIT 3

(Seal) DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Illegible JAN 1977

Mr. William Brey, Chief
Division of Law Enforcement
Illinois Department of Conservation
400 South Spring Street
Springfield, Illinois 62706

Dear Mr. Brey:

This is in response to your letter of 30 November 1976 concerning the discussion of fire extinguisher regulations at the National Boating Safety Advisory Council (NBSAC) meeting on 19 October 1976.

The discussion on fire extinguishers was a report to the Council by the Coast Guard that we were not able to find accident data which would justify a change to the current fire extinguisher requirements. Mr. Gruenewald was permitted by the chairman to address the Council and his remarks are a part of the permanent video/audio recording of the meeting. The summary minutes prepared of the meeting to which you refer are for the information of the members and other interested parties and cover only the highlights of the meeting. Since you feel that the comments by Mr. Gruenewald were of significant importance in this matter. I will take steps to incorporate them as an addendum to the minutes of the NBSAC meeting scheduled for February 1977.

A review of the recording indicates that Mr. Gruenewald addressed the subject in three parts: his disagreement

with the Coast Guard's position on the lack of statistical justification; an alleged promise by a senior Coast Guard officer a number of years ago that fire extinguishers would be required on all boats; and that such a requirement would simplify matters for the law enforcement officer. It apparently was primarily this last point which elicited the response to Mr. Gruenewald by the NBSAC member and the Council chairman, who indicated that to require equipment to simplify matters for the law enforcement officer was not a defensible position and one that could not be considered by the Council. The record of the meeting also shows that some States do not support the Coast Guard's position in this matter as reflected in the comments by members Morey, O'Brien and Downing.

Subj: Recent Minutes of the Boating Safety Advisory Council pertaining to Fire Extinguishers on all motorboats.

I am sure that Admiral Lauth and his staff are willing to meet with you to discuss matters related to boating safety at any time. However, you must be aware that under the provisions of Section 6 of the Federal Boat Safety Act of 1971 that the Coast Guard must consider the need for and the extent to which any regulation will contribute to boating safety. For instance, requirements for a dewatering device and a secondary means of propulsion were reviewed and, although recommended for carriage by a prudent boater, could not be justified as a regulation. It is for this reason also that we are seeking additional information before any visual distress signal requirements are placed on the boater.

It was the clear Congressional intent of Section 10 of FBSA '71 that Federal requirements should preempt States' law pertaining to boat and associated equipment standards and carriage requirements. We issued a temporary exemption to this provision, applicable only to those State associated equipment requirements in effect on 10 August 1971 (the effective date of FBSA '71), to enable us to look carefully at each requirement before requiring affected States to change. This was the purpose of our report to NBSAC. Since the Illinois fire extinguisher regulation in question was enacted after 10 August 1971, the preemption provisions of FBSA '71 are in effect.

I trust that we have been responsive to your concern in this matter. Please feel free to call upon the Coast Guard if we can be of further assistance.

Sincerely,

/s/ O. W. Siler
O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Copy to:
Mr. Edward J. Heine, Jr., Chairman
National Boating Safety Advisory Council

EXHIBIT 4

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

G-EMI/81
16751
DATE 13 JUL 1977

SUBJECT: Federal Preemption of California Assembly

FROM: Chief Counsel

TO: Chief, Office of Boating Safety

REF: (a) G-BA-1 memo 16751 dtd 13 Jun 1977

1. Reference (a) requested an opinion as to whether that portion of California Assembly Bill #876 which relates to boating safety is preempted by Section 10 of the Federal Boat Safety Act.

2. Although the Coast Guard has not promulgated regulations governing the use of liquified petroleum gas on recreational boats carrying six or fewer passengers, it is my opinion that this subject matter was intended by Congress to be included in the definition of "associated equipment" as set forth in §3(8)(B) of the FBSA. The legislative history of the Act is replete with references of the need to reduce the number of boating accidents caused by fire and explosion, not only from main fuel systems, but also from other sources. During hearings preceding enactment of the FBSA, Admiral Wagner testified that the Coast Guard would concentrate its efforts under Section 5 of the Act to reducing the

number of deaths, injuries and property damage due to fire and explosion by devising appropriate safety standards.

3. In light of this intention to include liquified petroleum gas equipment within the definition of "associated equipment," as evidenced by the legislative history of the FBSA, it is my opinion that the proposed California Assembly Bill, as it pertains to the regulation of boating safety standards, would be invalid in the absence of express federal approval. The appropriate state officials should therefore be notified that an exemption granted under Section 9 of the FBSA would be required to validate the proposed state regulation.

4. Although the proposed legislation is worded to prevent the sale, rather than the manufacture, of boats without the leak detection device, it is my opinion that Section 10 of the FBSA would nonetheless apply in this case. Section 10 prohibits the states from establishing any requirement for associated equipment. By mandating the proposed leak detection device, California, in effect, would be establishing such a requirement indirectly.

/s/ G. H. Patrick Bursley
G. H. PATRICK BURSLEY

EXHIBIT 5

The National Boating Safety Advisory Council

REPORT
OF THE
PROPELLER GUARD
SUBCOMMITTEE

Presented
November 7, 1989

CAPT. James E. Getz, Chairman, State Member
Mr. Donald J. Kerlin, U.S.C.G. Representative
Mr. Richard H. Lincoln, Industry Member
Mr. William D. Selden, Public Member
Mr. Herman T. VanMell, Public Member

REPORT OF THE PROPELLER
GUARD SUBCOMMITTEE
OF THE
NATIONAL BOATING SAFETY ADVISORY COUNCIL

I. INTRODUCTION: THE SUBCOMMITTEE AND ITS PURPOSE

At the request of the U.S. Coast Guard, the National Boating Safety Advisory Council (NBSAC) on May 11, 1988, appointed a subcommittee to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers. Feasibility of some form of mechanical guard or other action to prevent such contact was to be examined. A copy of the charge to the Propeller Guard Subcommittee (the Subcommittee) is attached as Appendix A.

The Subcommittee determined that no minutes or transcripts would be kept but that, at the conclusion of its work, all documentary materials received be delivered to the Coast Guard for its files, and that the Subcommittee's final report to NBSAC, together with minority or dissenting statements, if any, stand as the definitive record of its work.

II. INFORMATION OBTAINED

At the outset, the Coast Guard supplied materials from its files to the Chairman, who sent requests to the persons and organizations listed in Appendix B asking for files, data, case histories and other information bearing on the subject. Documents received were copied and distributed to each member of the Subcommittee for study prior to the first meeting. At the conclusion of that meeting, the Subcommittee developed a comprehensive list of further documentation, materials and information to be sought, and of persons to be invited to meet with the Subcommittee. Documents and materials were also volunteered by interested parties. Video tapes and other visual materials were exhibited at the meetings. Appendix C lists all documents received and considered, along with video tapes and visual materials reviewed by the Subcommittee.

III. MEETINGS HELD

The first meeting of the Subcommittee was held at the Boston Whaler facilities at Rockland, Massachusetts, on September 22 and 23, 1988. Various types of propeller guards, both commercially available and experimental,

underwater motor housing appendages and other relevant materials were presented but not deposited with or retained by the Subcommittee. Members of the Subcommittee also viewed and were given a hands-on opportunity to operate Boston Whaler boats used by the U.S. Marine Corps, one equipped with a "Chadwell" ring-type guard, and the other without.

The second meeting was held in New Bern, North Carolina, on November 14, 1988, and a third meeting at Couer d'Alene, Idaho, on May 12 and 13, 1989. Following that session, the Subcommittee concluded that sufficient written and verbal presentations and demonstrations had been seen and heard to cover the field; collection of documentary material amassed and reviewed was reasonably representative of presently available, relevant data; and further document search or additional meetings with concerned persons was unlikely to produce substantial additional information.

Between the May 1989 and November 1989 NBSAC meetings, this report was drafted and unanimously approved by Subcommittee members, and the Chairman was directed to deliver it to NBSAC at its regular meeting scheduled for November 6, 1989. The Chairman was directed that, following NBSAC action on the report, all documents and other materials collected by the Subcommittee be delivered to the U.S. Coast Guard for its files.

IV. INDIVIDUALS HEARD

The following persons made presentations to the Subcommittee and generally made themselves available for questioning and discussion. Other interested persons

attending the meetings are listed in the order of appearance:

1. Richard Snyder: Principle Engineer-Product Evaluation with Mercury Marine. Has testified in behalf of Mercury as Defendant in opposition to guards.
2. Brian Chadwell: designer, manufacturer and seller of ring-type propeller guards. Has testified on behalf of plaintiffs in propeller strike litigation.
3. Ben Hogan: attorney for plaintiffs in such cases and proponent of guards.
4. Donald Blount: civilian naval architect, 34 years with the U.S. Navy, heading the section for design and testing of small boats. Has testified for defendants.
5. Lars Granholm: at one time employed by the Coast Guard as an engineer, currently Director of Industry Safety Standards for the National Marine Manufacturers Association. Has testified for defendants.
6. D. P. Huelke: Professor of Anatomy, University of Michigan, researcher and consultant on trauma injuries, particularly in the automobile industry. Has testified for defendants.
7. Robert Taylor: marine engineer and naval architect, formerly of the University of Michigan and U.C. Berkley, former ship designer for the U.S. Navy, and currently Supervising Marine Engineer of Failure Analysis, Inc. Has furnished statistical data on behalf of defendants.
8. Dr. James Benedict, M.D., Biodynamic Research Corporation, a researcher on effect of traumatic

impact on the human body. Has testified on behalf of defendants.

9. Ms. Linda Earnby: victim of a propeller strike injury and advocate of guards. Represented the Florida Audubon Society.

10. Dr. Albert Burstein: New York City's Hospital for Special Surgery, a mechanical and biomechanical engineer specializing in sports related injuries and development of protective devices.

Dr. Lawrence E. Thibault, of Biomechanics, Inc., and the University of Pennsylvania, who has testified as a plaintiff's expert biomechanics witness in numerous propeller strike cases, accepted an invitation to participate in, and was scheduled for the Idaho meeting, but failed to appear. (The Subcommittee had previously received a copy of his report and letter dated August 14, 1987, prepared for plaintiff's attorney Stephen R. Bolden in seven of the 19 propeller strike cases described in the report).

In the Subcommittee's deliberations, reports prepared by engineers John G. Hill, Arthur M. Reed and Robert Taggard, in support of plaintiffs in litigation, were reviewed, along with other pertinent documents. (See Appendix C)

V. KEY POINTS COVERED BY VERBAL INPUT AND WRITTEN MATERIALS

1. Litigation

A number of law suits have been filed by victims of alleged propeller strikes to recover damages from the

operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat. In those cases seeking to hold the engine manufacturer liable, the following legal theories have been asserted by propeller guard advocates:

a. The manufacturer has a duty to design boat propulsion machinery in a prudent manner which includes a duty to design against hazards, if feasible. Since propeller injuries are a known hazard, and guards are presumed feasible, a manufacturer is negligent and liable for damages (regardless of, or in addition to, liability of the boat operator), for failing to incorporate guards.

b. Alternatively, if no feasible guards presently exist, the manufacturer is nevertheless presumed liable for failure to have funded and conducted whatever research and development may be needed to design and produce effective guards.

c. Guards, in addition to protecting persons, also protect propellers from destructive bottom contact. They are currently feasible and available, and manufacturers should be liable because they choose not to furnish guards in order to profit from sale of replacement propellers.

Advocates have petitioned federal and state legislators and regulators to mandate propeller guards. Such mandate would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them. Feasibility, accordingly, is one of the important questions before the Subcommittee.

In defending "propeller strike" cases, engine and boat manufacturers have asserted:

a. Guards are feasible only at idling or very low speeds and for limited purposes, but are not feasible at normal operating speeds at which the majority of propeller strike accidents occur.

b. A very high percentage of the reported accidents of "struck by boat or propeller" do not involve propeller strikes, but involve impacts with the boat hull or a stationary component of the lower unit.

c. At normal recreational boat operating speeds the increased drag and hydrodynamic characteristics created by known types of guards cause a new hazard by dangerously affecting the handling and stability of the vessel.

d. Since all types of known guards substantially increase the frontal area of the underwater appendages of an engine, the chances that a victim will be hit are greatly increased.

e. A victim hit by other than a very slight glancing blow from the guard on a boat operating at normal or planing speeds, will suffer impact injuries more devastating than being cut by a propeller.

f. The ring-type and wire mesh or "catcher's mask" guards create a new hazard of catching and trapping a victim's limbs resulting in more severe injuries and/or drowning.

g. To recover normal operating speeds lost to guard drag, the engine horsepower and fuel consumption must be raised by at least 50% with consequent and proportionate increases in exhaust emissions.

h. To retrofit the propulsion units now in existence would require the design and manufacture of several thousand different guard models, since each one must be individually designed for the engine to which it is to be fitted. Every unit must be engineeringly modified for the boat hull on which the engine is mounted, to guard against dangerous handling characteristics.

Manufacturers are opposed to mandatory propeller guards and assert that propeller strike accidents constitute less than 5% of the total annual boating fatalities. They assert that safety efforts and education should address operator incompetence, negligence and alcohol involvement. Improvement in the overall field of safe boat handling would, in the same proportion, beneficially affect the incidence of propeller strikes and underwater impacts.

2. Statistical dimensions of the problem

Statistical sources include accident reports filed with the Coast Guard, hospital emergency room sampling by the National Electronic Injury Surveillance System (NEISS), state records, insurance records, and statistical sampling and analysis of selected groups of cases by professional organizations. There are obvious variations in reported statistics. No universally accepted, accurate and complete compilation came to the Subcommittee's attention.

Reports of individual accidents are made at varying times after the accident and may be prepared by the operator, the victim, or an enforcement officer who normally has not seen the accident and must rely on witnesses, if available. Attending physicians in emergency rooms, under the pressure of giving immediate medical

or surgical attention, will have difficulty in understanding exactly what happened and in what sequence. Of these people, very few, if any, will have undergone specific training to qualify them as experts in determining the cause of such injuries.

The standard form of boating accident report as prepared by the Coast Guard and followed by many state agencies has one category to be checked under the box "type of accident" identified as "hit by boat or propeller". Such reports, principal source of statisticians, do not distinguish whether the victim's injury resulted from striking by the boat, the underwater propulsion unit which precedes the propeller (namely, the gear housing, skeg, anti-ventilation plate), or by the propeller, or a combination of all three. (See Figures A and B) The reporting form also does not have a specific space for reporting speed at the time of the accident.

The Coast Guard believes that only 5 to 10% of all boating accidents, not involving fatalities, are reported. The Subcommittee believes that the completeness of accident reporting varies proportionately to the severity of the injury, from nil in the case of very minor injuries, to fairly complete in fatalities.

Although available statistics are imperfect and incomplete, it is probable that the circumstances influencing the preparation and filing of reports remain constant. Thus year-to-year comparisons and trends, particularly as to fatalities, are reasonably informative and valid for the purposes of this inquiry.

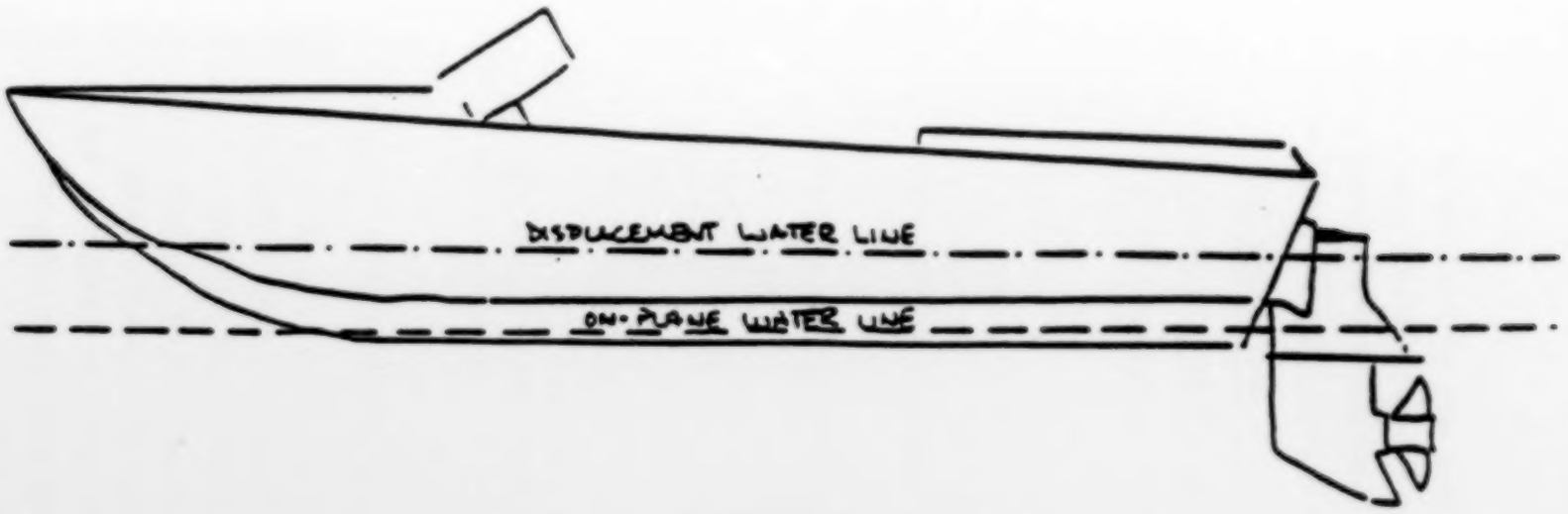


Figure A

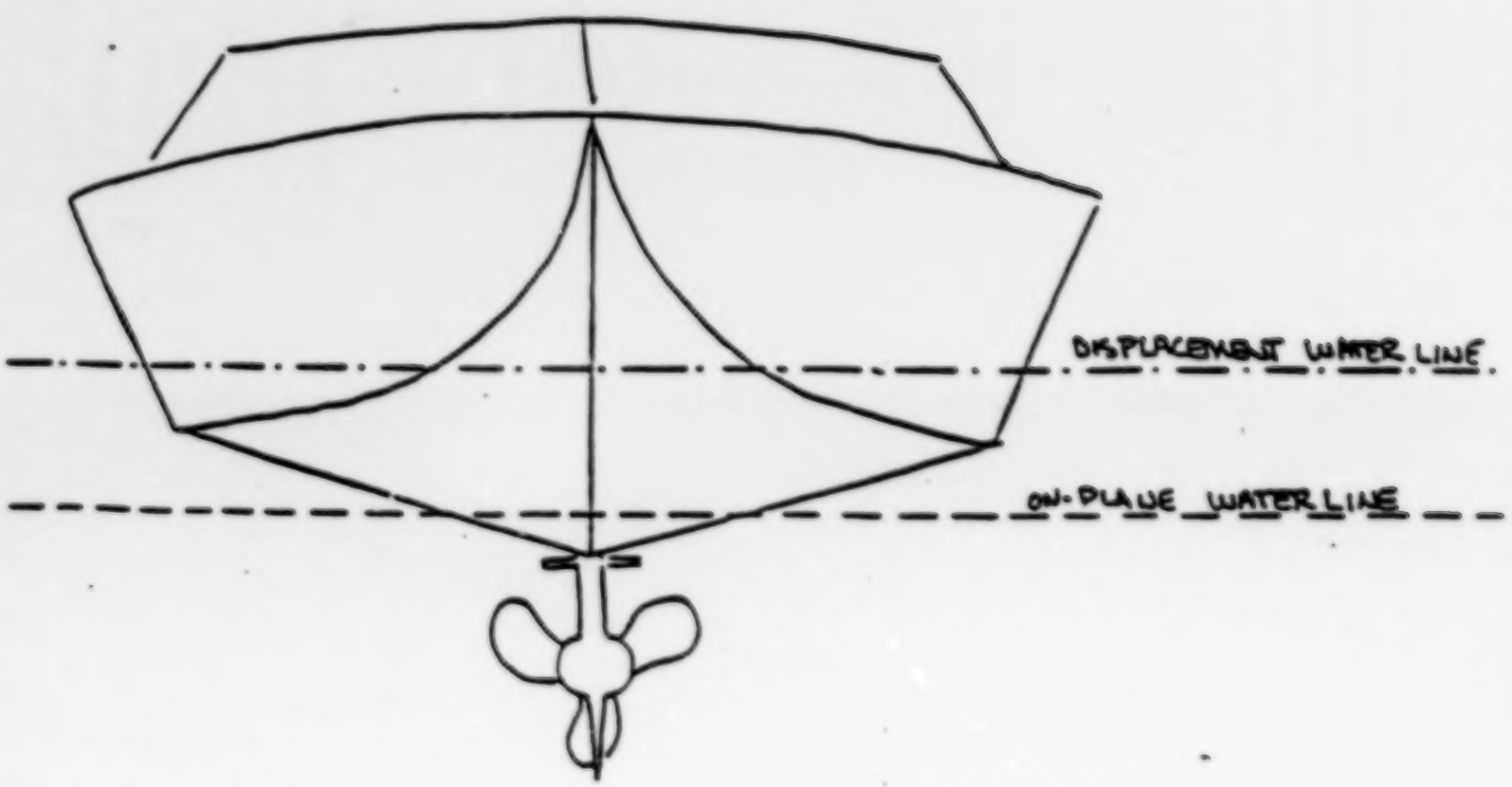


Figure B

In contrast to the obvious deficiencies of accident reporting, statistics on the number and types of boats and engines manufactured and in use can be considered accurate. The following data was used by the Subcommittee:

Boat population of the United States as of 1988

Horsepower of the engine(s)	number
*None (rowboats, canoes, inflatables)	4,100,000
1 to 5	1,600,000
6 to 10	2,100,000
11 to 30	1,700,000
31 to 50	2,300,000
51 to 100	2,500,000
Over 100 horsepower	2,700,000
	17,300,000

Boat length by feet

Under 16	9,515,000
16 to 25	7,149,000
26 to 39	568,000
40 to 65	95,000
Over 65 feet	11,000
	17,300,000

*Exception: only occasional use of low horsepower engines.

3. Annual recreational boating fatalities

Robert Taylor of Failure Analysis, Inc. presented information from his organization's data base which had been compiled from all major statistical sources (See Appendix E). Summarizing such statistics for the year 1982: fatality total for recreational boating was 1,183 compared to 1,594 for swimming pools, 1,900 for firearms (excluding homicide and suicide), 2,800 swimming, 4,453

motorcycles, with motor vehicle fatalities exceeding 43,000. For open motorboats of 14 to 18 feet in length, the contributing factors to fatalities were: falls overboard 35.8%, capsizing 31.9%, collisions 21.2%, swamping/flooding 8.9%, and struck by propeller 4.9%.

The calculated risk of fatality in 1982 per each million activity hours of recreational boating was said to be 1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (within which the risk of propeller strike itself is very small fraction). The estimated number of fatalities per million exposure hours in recreational boating (0.14) was compared at the bottom of a list of other recreational activities, with 0.88 in hunting, 1.41 in high school and college football games, 3.08 in scuba diving and 17.34 in private flying.

Water skiing was considered a special risk in itself (separate from the category of recreational boating) and, according to Failure Analysis data, accounted for some 40 annual fatalities (only a portion of which were propeller strikes). It is estimated that over 14,000,000 persons participate in water skiing annually.

4. How propeller strike accidents occur

In almost all cases the victim is in the water, as a swimmer, snorkeler or scuba diver, a downed water skier, or more frequently, as a result of falling or being thrown from a boat. While some victims have been struck by

propellers in the air in accidents where one vessel collides with and passes over another vessel, such incidents appear to be rare.

Passengers moving about or improperly seated, such as "bow riders", or persons sitting on the gunwales or transom, are ejected by sharp turns, wave or wake bounces, all at speeds which may be too fast for the prevailing conditions. Persons also are ejected from boats by collision with another vessel or fixed object. Operator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors in reported "propeller strikes" as well as in other kinds of boating accidents. Ejections can also be caused by sudden acceleration or deceleration, either from operator error, equipment failure or malfunction, or striking masses of weeds or other submerged objects.

Presentations illustrated that approximately 80% of all accidents occur when a boat is operating at speeds in excess of 10 miles per hour, i.e. normal operating or planing speeds. Accidents occurring at idling or slow speeds (2 to 10 miles per hour) most typically appear to happen when the operator is in the process of picking up a fallen water skier, moving in the vicinity of swimmers, or inadvertently putting an engine in gear when swimmers are using a boarding ladder or platform.

5. Types of propulsion

The most common propulsion unit used is the outboard motor, mounted on the stern of a boat and rotated to steer the boat. Second is the inboard/outboard device, powered by an engine mounted inside the boat, with an

exterior drive unit containing a gear case and propeller, which is moved from side to side to steer the boat. In both cases, the lower unit, including the propeller, serves as the rudder in steering the boat.

A third common means of propulsion is an engine mounted in the boat to power a shaft passing through the hull, and generally through a supporting strut, at the end of which the propeller is mounted. Such boats are steered by one or more separate rudders and may be either planing or displacement boats. Included in displacement boats are sailing vessels with inboard mounted engines and a shaft through the hull, sometimes off-center and sometimes on center line, with a cut out or other space between the shaft and a rudder, auxiliary sail boats commonly travel at speeds, when under engine power, well below 10 mph. Many small sailboats use low power outboard motors for auxiliary propulsion at low speeds. Auxiliary powered sailboats did not figure in any propeller strike accidents coming to the Subcommittee's attention.

In a fourth propulsion method, water is taken in through a submerged scoop and ejected by an impeller as a high speed jet of water pushing astern. A steering rudder may be required. Outboard jet engines have appeared on the market in recent years, particularly for fishing in very shallow water. Manufacturers state that jet drive outboards are 25% less efficient than comparable horsepower propeller driven outboards. In traditional boat types, jet propulsion units do not appear to have succeeded commercially. This has not been the case, however, with "personal watercraft". This jet-driven type of

boat is increasingly figuring in accident and fatality statistics through collisions with other vessels or with swimmers in the water and operators falling in the vicinity of other craft.

6. Propeller guard designs and availability

Although many variations have been conceived and patents granted, there are essentially only three basic configurations of "propeller guards".

First is a ring band device commonly secured to the submerged portion of an outboard motor or stern drive unit and within which the propeller revolves. Unless supplemented by sufficient bars or mesh across the rim front and back, fingers, hands, arms, etc., can enter the ring and contact the propeller. Proponents of guards assert that most victims are struck at an angle to the boat, rather than frontally; that a boat in motion creates a pressure wave tending to push bodies to the side; and, therefore, that in most impacts a victim would receive only a minor glancing blow from a guard. As to frontal hits with a guard in place, it is asserted that the leading edge of the ring could be constructed of crushable material to absorb the energy of the impact, or be cushioned with flexible material covering metal or plastic parts, thus preventing serious injury to the struck victim.

Opponents assert that a blow from a guard, either frontally or at an angle from a boat traveling at speeds of over 6-10 miles per hour or any boat at planing speed, could cause serious or fatal impact if hitting the head or chest; that at such speeds a human body in the water is held stationary relevant to the striking force, and there is

no wave effect pushing bodies to the side. Also, there is no known material available which, as a part of a propeller guard, could absorb energy on impact with the human body in water and maintain its shape and structural integrity under normal use. Opponents further assert that this guard significantly increases the total area of possible underwater impact.

The second general type of guard is a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires. Some patents show bars forward of the propeller, some vertical, some horizontal or combinations. To maximize protection, mesh must be small enough to prevent insertion of limbs and/or appendages and totally encompass the propeller. The mask device also significantly increases the total area of possible underwater impact. In the use of both the ring and the mask-type guards, opponents have stressed that the frontal impact area would be increased by three times by attaching the guard (See Figure C). They further contend that, while a submerged body limb may not be struck by the rotating blades of the propeller, they would certainly be struck by the guard, if the limb were in the path of the lower unit.

A third type is shrouding the propeller in a tunnel or tube, and in its most common application is referred to as the Kort nozzle. This was designed to control water flow to and through a propeller to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships. Vanes can be inserted in both the forward and aft ends of such nozzles to direct the flow of water for maximum efficiency and serve as barriers to the entry of body parts.

Examples of the ring and mask types of guards were examined by the Subcommittee. No example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee. No guard device suitable for inboard engine drive propellers on displacement or planing motor boats, or on auxiliary sail boats was presented.

7. Present use of guards

Fine mesh cage guards have been used for many years on amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible. Also, a blow to a person in the water at such very slow speeds has minimal effects. No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds.

The mask guard with spaced rods is used in various parts of the world on rescue boats, often on inflatables, powered with 25 or more horsepower engines. In the typical rescue operation, the boats speed to the rescue scene and then operate at slow or idle speed while carrying out the rescue. The wide spacing of the bars required to minimize critical drag in speeding to the rescue scene does not prevent entry of body appendages.

It was reported that approximately 2,000 of the "Chadwell" ring-type guards have been sold, with some used on rescue boats in Australia and New Zealand and California. Some boats used by the U.S. Marines have been equipped with these guards. The intended use is to

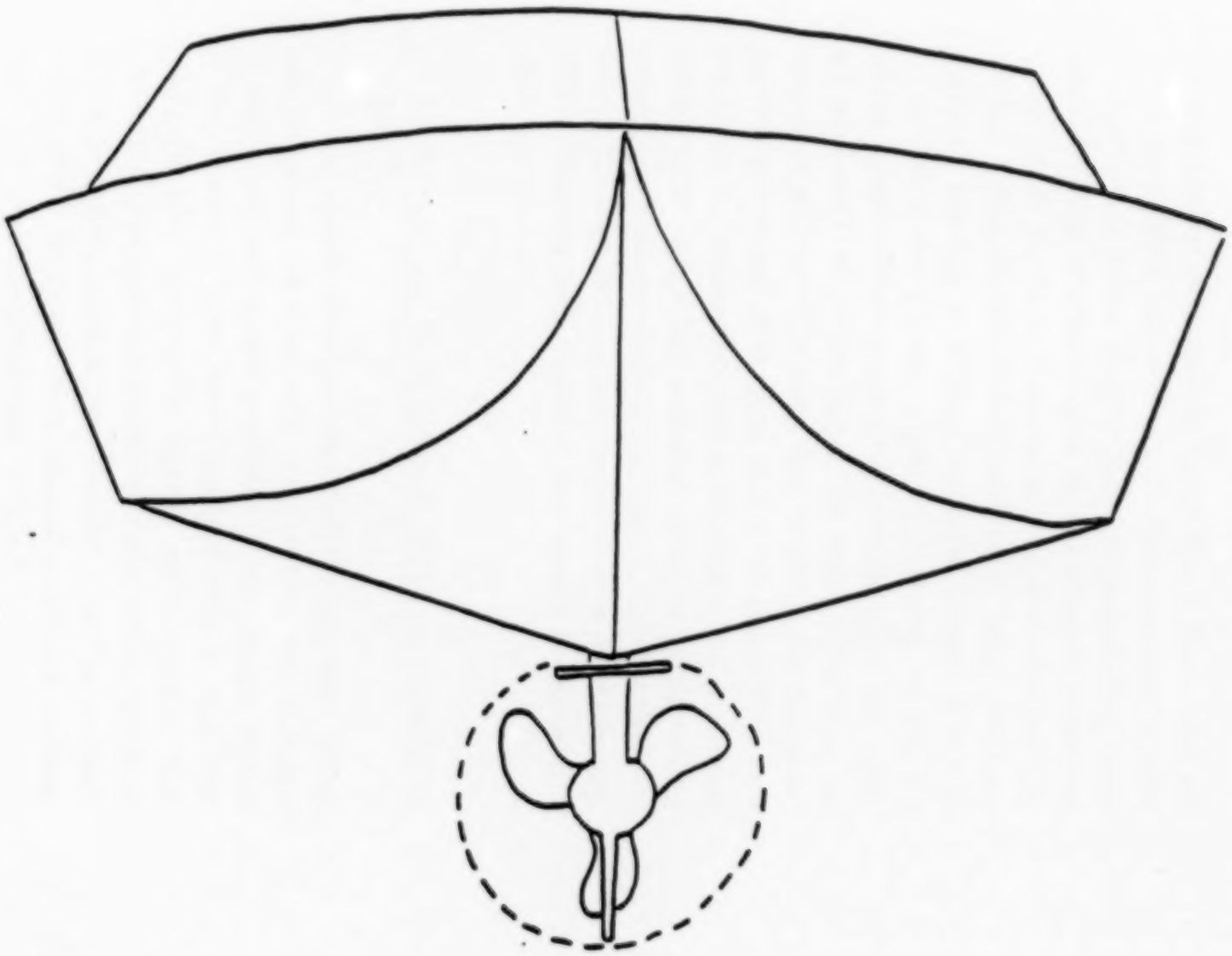


Figure C

deposit Marine personnel in the surf and then stand offshore to await their recovery. In this simulated combat situation, it is critical to keep the motors operating, while also affording a certain degree of protection to personnel in the water. The Subcommittee understands that the U.S. Marine Corps is undertaking additional, more extensive study on the use of different types of guards. The U.S. Navy makes limited use of guards (although it was not stated whether they were rings or masks) to minimize entanglement of diving hoses on some boats used as diving platforms. The Navy has used "nozzle shrouds" around propellers of landing boats operating from well decks on the mother ship to move cargo and personnel ashore. This usage has a prime objective of protecting propellers from mechanical damage in striking the bottom of the well deck or submerged objects on the beach, while achieving high thrust at low speeds for more efficient operations.

8. Mechanical and hydrodynamic problems inherent in guards

It was clearly demonstrated that the ring-type guard creates severe steering and trim effects which cause serious safety and control problems. In the demonstration of the Boston Whaler boat equipped with a ring-type guard, the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result. Rings and their mounting devices increase drag with corresponding loss of speed.

An engineer for one of the engine manufacturers described experimental work done for the Marine Corps on a mask guard which would have less severe steering and trim hazards than a ring guard and was expected to be less subject to critical damage on hitting bottom or submerged objects. The first cage, built of 5/16" diameter steel rod stood up structurally, but its drag reduced boat speed from 35 mph to 19 mph (when compared to use without a propeller guard). The second, built of 1/4" diameter steel rod more widely spaced solved steering but not drag problems, and vibration forces broke the welds. The added drag due to this mask or cage reduced boat speed from 37 mph to 27 mph (with two 70 horsepower engines). It was stated that, to regain the desired speed of 37 miles an hour, horsepower would have to be increased 100% to a total of 280. It was also found that the mask, as well as the ring-type guards, was vulnerable to crushing on hitting the bottom, pushed down by the weight of the boat bouncing in the waves, with consequent disablement of the engine. It was further stated that the objective of simultaneously protecting the propeller from damage, protecting landing personnel, and making no material sacrifice of speed involved irreconcilable physical laws and an insoluble manufacturing dilemma. To make the guard strong enough to withstand hitting the bottom or hard object resulted in unacceptable drag and handling – and to conserve desired speed, steering control and prevent entry of body appendages the guard would have to be so lightly constructed that it could not stand up to normal operating loads.

9. Biomechanical considerations

The density of water is approximately 830 times that of air. The density of the human body is approximately the same as water. Therefore, it follows that a human body immersed in water cannot move independently of the water around it. The result of an object striking a human body in the water is that the body absorbs most of the energy of the striking object. As the speed of a striking object increases, the transferable energy increases by the square of that speed, and the force of the blow becomes correspondingly greater. The resistance force on body movement in water at 1 mile per hour is the same as a force of 29 mph in the air. It was repeatedly stated that a skull impact at 10 mph or more in the water would be generally fatal. A glancing head blow twisting the neck could result in a sheared neck at such speeds, and a chest strike could result in rib flexing in an unsustainable amount. Even with an idealized cushioning material, not currently known to exist, head or body cavity strikes at speeds over 10 mph could likely be fatal.

The auto industry and independent researchers have an extensive data bank resulting from numerous crash tests using technically sophisticated, instrumented manikins, from which generally accepted tables have been constructed concerning the forces which result in serious and fatal injuries. Although there are no such completed studies available regarding underwater impacts, tests have been conducted which reveal significant similarities. Video files of boats striking simulated limbs, surgically comparable to human limbs, and other submerged objects illustrated the injury-causing forces involved when an 18 to 25 foot boat, weighing up to thousands of pounds,

traveling at speeds varying from 10 to 35 mph hits a body or object.

The human body has numerous rotational joints, i.e. the neck, wrists, fingers, elbows, ankles, etc. All are subject to serious and permanent injury depending on the force and mass involved in the impact. An oblique strike by any underwater appendage can result in rotational injury or injury transmitted to another part of the body. According to Failure Analysis data, sports trauma, such as high school and college football, has nine times the fatality risk of recreational boating. This data reinforces the promise that serious or fatal injury can result from even relatively low speed and/or mass impact depending on the angle of the striking force and the location of the impact.

Propellers present the hazard of cutting wounds and penetrations of the body, while other underwater appendages, including guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe.

It was stated that at a speed of 10 miles an hour, any fixed appendage of a boat (example: the skeg of an outboard motor) crosses a submerged limb in 1/50th of a second. With the water holding the limb relatively immobile, the limb tissue is torn, then the bone is crushed, producing a wound more serious than propeller cuts. Due to its revolutions, a propeller generally produces a series of evenly spaced cuts which are relatively easier to repair surgically.

All machinery or objects, whether created by man or nature, can inflict injury. It is impossible to make everything totally free of hazard. At a cost, we can be protected against many hazards. Most of the annual 43,000 motor vehicle fatalities, for example, could probably be prevented by mandating a national speed limit of 10 mph. The economic and social cost, however, would be unacceptable.

By definition, a guard must both diminish a hazard and leave the object capable of normal function, at a cost which is reasonable in proportion to the extent of the hazard. Diminishment of hazard is classically accomplished by various means, including barriers, shut down devices, warnings and education for safe use. Above all, it is fundamental that a guard should not create a condition which leads to a new or worse hazard.

VI. SUMMARY

Up to 80% of underwater impact accidents occur at normal operating speeds, in excess of 10 mph and more usually in the 13 to 35 mph range. The craft most typically involved is in the 15 to 25 foot range, powered by an outboard or inboard/outboard unit or units of 25 horsepower or more. This also is the bracket where the great majority of all accidents involving powered vessels occurs. Recent data reveal an increasing level of involvement of personal watercraft in boating accidents. The risk of accident increases during water skiing activity.

Nevertheless, boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or

negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.

Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should be mandated. The Subcommittee does not agree and offers the following comments:

1. The concept of mask and ring-type guards is feasible at idling and very low speeds. Fine mesh guards can prevent propeller contact but are not feasible above 2-3 mph, which rules them out for recreational boating. Masks with wide mesh or spaced bars and ring guards may prevent cuts from body contact with a propeller but substitute the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to an ascending serious risk of fatality as speeds increase. In recent accident reconstruction training exercises, it has been demonstrated that boats and their appendages can easily be construed as projectiles. Boats operating at planing speeds can easily penetrate or cause serious damage to other boats. These demonstrations serve to reinforce the damage potential of boat impacts with persons in the water. Either guard presents an underwater profile of significantly larger frontal area, thereby increasing the chances of contact. In the case of the ring-type guard, a new hazard is created, in that an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller. Operators of a

"guard-equipped" boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage.

2. A speeds of approximately 10 mph or greater, both types of guards – especially the ring – affect boat operation adversely. Both guard types result in drag increasing proportionally to the square of speed, resulting, in substantial power and speed loss. This will require greatly increased power and fuel consumption to regain the lost speed.

3. Propellers encased in the Kort nozzle, or tunnel, substitute impact for propeller cut hazard, have rapid loss of efficiency above 10 mph and are not operationally feasible at normal pleasure boat speeds. The Kort nozzel is viewed as a low speed efficiency enhancer and not a guard.

4. Water jet propulsion eliminates the propeller and diminishes the underwater appendage impact area, but at a minimum 25% loss in efficiency and results in newly created operational handling problems.

5. No known materials are available to construct "soft" propellers or to construct or coat guards so as to absorb impact energy and prevent injury, yet maintain structural integrity and serve the intended purpose.

6. Adequate seat belts, if used by all boat passengers, could prevent some operator and passenger ejections into the water. A belted person involved in a capsizing, however,

would then be subject to the risk of death by drowning.

7. Any guard would have to be both hydrodynamically and structurally compatible with the intended propulsion unit. Further, guards must not only fit the motor but be designed for hydrodynamic compatibility with the hull on which the motor is used. Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

8. The suggestion that guards should be mandated, at least for water ski boats during which activity accidents occur at both high and very low speeds, and for boats equipped with swimming platforms and ladders, presents other problems. Water skiing or swimming from a boat is a part-time and limited activity and does not describe a boat type. Recreational boats are multi-purpose in nature, which precludes the practicality of an off-on use of a propeller guard. If guards were readily removable, automotive experience clearly shows that they would be by-passed by permanent removal. The Subcommittee feels that it is not practical or feasible to mandate guards for specific uses, such as water skiing or while a boat is

being used as a swim platform. Furthermore, the removal of a guard could result in inadvertent or intentional overpowering of the boat.

CONCLUSIONS

1. Accident data and the analysis of accident data must be an integral component of a study of this nature. There is no one single source, best source, or all-inclusive source of accident data. However, the available sources can be utilized collectively to give an accurate portrayal of the significance, frequency, and relative magnitude of underwater impacts to other causes of boating accidents in particular and accidents in general. There is no indication that any change in reporting would reflect significant changes in the relative position or percentage of injuries/fatalities due to underwater impacts. Therefore, propeller guarding at best could have only a negligible impact on improving boating safety.

2. Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counterproductive and can create new hazards of equal or greater consequence.

3. Operator error is clearly a significant factor in the vast majority of underwater impacts which result in

injuries/fatalities. Mandatory equipment requirements could be expected to have only a negligible impact on this problem. The most rational approach to the problem is to educate boaters, especially operators. They must be made to understand the abilities and limitations of their equipment. They must be aware of and understand the hazards their boat can cause to people in the water. Above all, they must be made to understand the consequences of careless or negligent operation of their watercraft, and how they, as boat operators, can act to prevent accidents.

4. Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

RECOMMENDATIONS

1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

3. The U.S. Coast Guard should implement necessary steps to have included in national and state level

educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Unanimously adopted by the
Propeller Guard Subcommittee

by /s/ James E. Getz
James E. Getz, Chairman

for: Donald J. Kerlin
Richard H. Lincoln
William D. Selden
Herman T. VanMell

APPENDICES

APPENDIX A .... Charge to the Subcommittee
APPENDIX B .... List of Subcommittee Contacts
APPENDIX C .... List of Documents and Materials Reviewed
APPENDIX D .... Subcommittee Agendas
APPENDIX E .... Failure Analysis Associates Summary
APPENDIX F .... Subcommittee Members

APPENDIX A

Charge to the Subcommittee

APR 13 1988

NBSAC COMMITTEE

Propeller Guards/[Propeller Strikes/Propeller Protection]

Charge to the Committee:

- Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

- Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

- Among points to be considered:
  a. what is the incidence of such accidents?
  b. is there a trend toward more or fewer such accidents?
  c. what are the possible solutions and their advantages/disadvantages?
  d. how is this problem being addressed in other nations?
  e. what would be the direct costs and indirect costs (fuel economy, maintenance, etc.) of mechanical solutions?
  f. can the risks be addressed adequately by education?
  g. should the Coast Guard move towards a federal requirement for some form of propeller guard?
  h. assess the potential for propeller equipped with each of several propeller guard designs to cause injury. How much has the propeller guard reduced the injury potential compared to the injury potential of the same propeller operating in an unguarded manner?
  i. should only new boats and motors be equipped with propeller guards, or should all boats eventually be equipped with a guard?
  j. what is the practical boat length limit beyond which propeller guards would not be required? are there other parameters which would dictate upper limits for guard installation?

Committee members:

Jim Getz (Chairman)
William Past
Dick Lincoln
Don Ellison (USCG rep.)

APPENDIX B

List of Subcommittee Contacts

The following list represents the contacts made in behalf of the Subcommittee requesting information relevant to the Subcommittee's charge:

Dr. James Benedict, PhD., M.D.
Biodynamic Research Corporation
9901 IH 10 West
San Antonio, Texas 78230

Mr. Donald L. Blount, P.E.
Head, Combatant Craft Engineering Department
Naval Sea Combat Systems Engineering Station
P.O. Box 10418
Norfolk, Virginia 23513

Mr. Steve Bolden
Fell & Spaulding
211 South Broad Street, 8th Floor
Philadelphia, Pennsylvania 19017

Dr. Albert H. Burstein, PhD.
Director
The Hospital For Special Surgury [sic]
Department of Biomechanics
535 East 70 Street
New York, New York 10021

Mr. Brian Chadwell
Prop Guard, Inc.
1901 Shelter Island Drive
P.O. Box 6276
San Diego, California 92106

Dr. Michael Gallery, PhD.
Emergency Medical Foundation
Box 619911
Dallas, Texas 75261

Mr. Lars Granholm
Director, Technical Services
National Marine Manufacturers Association
401 North Michigan Avenue
Chicago, Illinois 60611

Director
Emergency Room Services
Falmouth Hospital
Ter Heun Drive
Falmouth, Massachusetts 02540

Director
Emergency Room Services
Jordan Hospital
275 Sandwich Street
Plymouth, Massachusetts 02360

Director
Emergency Room Services
Lakes Regional General Hospital
Highland Street
Laconia, New Hampshire 03246

Director
Emergency Room Services
Quincy City Hospital
114 Whitwell Street
Quincy, Massachusetts 02169

Director
Emergency Room Services
Salem Hospital
81 Highland Avenue
Salem, Massachusetts 01970

Executive Director
International Rescue and Emergency Care Association
8107 Ensign Curve
Bloomington, Minnesota 55438

Mr. Dennis Heussner
National Life Saving Director
Surf Life Saving Association of Australia
'Surf House', 128 The Grand Parade
Brighton-le-sands, N.S.W. 2216, Australia

Mr. John G. Hill
Naval Architect – Marine Engineer
P.O. Box 114
Oxford, Maryland 21654

Mr. R. Ben Hogan, III
Hogan, Smith, Alspaugh, Samples & Pratt, P.C.
2323 Second Avenue North
Birmingham, Alabama 35203-3758

Dr. Donald F. Huelke, PhD.
The University of Michigan
Transportation Research Institute
2901 Baxter Road
Ann Arbor, Michigan 48109-2150

Dr. Jack C. Hughston, M.D.
Editor
American Journal of Sports Medicine
428 East Preston Street
Baltimore, Maryland 21202

Mr. Alex B. Marconi
Senior Counsel/Litigation
Outboard Marine Corporation
100 Sea Horse Drive
Waukegan, Illinois 60085

Ms. Francis Munnings, Executive Editor
"The Physician and Sportsmedicine"
McGraw-Hill Healthcare Group
4530 West Seventy-Seventh Street
Minneapolis, Minnesota 55435

Mr. Arthur M. Reed
9106 Warren Street
Silver Springs, Maryland 20910-2140

Mr. Richard H. Snyder
Principle Engineer – Product Evaluation
Mercury Marine
W6250 West Pioneer Road
P.O. Box 1939
Fond Du Lac, Wisconsin 54936-1939

Mr. Robert K. Taylor, P.E.
Managing Engineer
Naval Architecture & Marine Engineering
Failure Analysis Associates, Inc.
2225 East Bayshore Road
P.O. Box 51470
Palo Alto, California 94303

Dr. Lawrence E. Thibault, Sc.D.
Biomechanics, Inc.
1611 Valley Greene Road
Paoli, Pennsylvania 19301

APPENDIX C

List of Documents and Materials Reviewed

The following is a listing of the documents and materials reviewed by the Subcommittee:

"Prediction of Whole-Body Response to Impact Forces in Flight Environments," by Ints. Kaleps, a paper reprinted from the conference Proceedings No. 253. Models and Analogues for the Evaluation of Human Biodynamic Response, Performance and Protection, North Atlantic Treaty Organization.

"Water Jet Propulsion – Competition for Propeller?," by Ralph E. Lambrecht, Society of Automotive Engineers, Automotive Engineering Congress, No.740283, February 25-March 1, 1974.

"Review of the State of the Art of Swimmer Protection from Outboard Propellers," by Robert Taggart, 16 February 1979.

"Waterskiing Injuries," by Larry R. Pedegana, M.D., and Janice Lang, *The Physician and Sportsmedicine*, Vol. 7, No. 6, 1979.

"Propeller Injuries Incurred in Boating Accidents," by Ronald J. Mann, M.D., *The American Journal of Sports Medicine*, Vol. 8, No. 4, 1980.

Unpublished letter to Mr. Al Marmo, U.S. Coast Guard from Mr. Dick Snyder, Mercury Marine, reference propeller guards, dated December 15, 1980.

"Waterskiing-Related Injuries," by Gregory Hummel, M.D., and Barry J. Gainor, M.D., *The American Journal of Sports Medicine*, Vol. 10, No. 4, 1982.

"Hi-Performance Boat Operation," a booklet published by Brunswick Corp., No. 90-86168 3-184, 1984.

"Steering/Struck-by-Propeller Accident Study, 1983 Recreational Boating Accidents," by Gary Traub, U.S. Coast Guard G-BP-1, December 18, 1984.

Surf Life Saving Training Manual, issued by the Surf Life Saving Association of Australia, 27th Edition (Revised), 1985.

Inflatable Rescue Boat Training Examination and Operations Manual, issued by the Surf Life Saving Association of Australia, Third Edition, 1986.

Coast Guard Memorandum to Chief, Marine Safety Technology Branch, from Chief, Medical Operations Branch, reference Mercury Marine tests, dated June 12, 1986.

"Everything You Need to Know About Propellers," a booklet published by Brunswick Corp., No. 90-86144, Third Edition, 1987.

"The Technological Feasibility of Propeller Guarding for Pleasure Planing Craft," by John G. Hill, February 10, 1987.

"Boat and Propeller Impact Injuries and Fatalities," Project 763584.20 Final Report, by Edward S. Purcell and Walter B. Lincoln, U.S. Coast Guard Research and Development Center, 1 March 1987.

"Motorboat Propeller Injuries," by Charles T. Price, M.D., and Charles W. Moorefield, M.D., *The Journal of the Florida Medical Association*, Vol. 74, No. 6, June, 1987.

"The Feasibility of Propeller Guarding," by Arthur M. Reed, July, 1987.

"Propeller Guarding," a letter report by Lawrence E. Thibault to Mr. Stephen R. Bolden, Esq., dated August 14, 1987.

"Principles of Human Safety," by Ralph A. Barnett and William G. Switalski, *Safety Brief*, Vol. 5, No. 1, Tiodyne, Inc., February, 1988.

Letter to CAPT. Roger T. Rufe, Chief, Congressional Affairs Staff, U.S.C.G., from The Honorable Orrin G. Hatch, United States Senator, reference Mr. Jackson Howard's concerns about propeller guards, dated March 28, 1988.

Letter to The Honorable Orrin G. Hatch, United States Senator, from the Coast Guard responding to Mr. Howard's concerns, dated April, 1988.

Letter to Mr. James D. Martin, Alabama Commissioner of Conservation and Natural Resources, from Mr. R. Ben Hogan, III, reference propeller guarding, dated April 11, 1988.

Letter to Mr. Al Marmo, Chief, Policy Planning and Evaluation Staff, U.S.C.G., from Mr. R. Ben Hogan, III, reference propeller accidents in Alabama, dated May 5, 1988.

Letter to Subcommittee Chairman Getz from Mr. Lars Granholm, National Marine Manufacturers Association, reference 1979 Coast Guard study, dated May 31, 1988.

"Specification Criteria for the Manufacture, Testing & Commissioning of Safety Guards for Use on Inflatable Rescue Boats Engaged in Inshore Rescue Activities, and Schedule of Approved Guards," Bulletin No. 504-88, The Surf Life Saving Association of Australia, National Council, May, 1988.

Slide photographs of various guard devices, components of lower units, and tests submitted by Mr. Richard Snyder, Mercury Marine, submitted August 12, 1988.

Struck by Boat or Propeller manual analysis of 1983-1987 Coast Guard data by Subcommittee member Kerlin, dated September 22, 1988.

Letter to Subcommittee Chairman Getz from Mr. Donald L. Blount, P.E., reference a summary of his presentation to the Subcommittee on September 22, dated October 1, 1988.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference propeller guarding information, dated October 6, 1988.

Letter to Subcommittee Chairman Getz from Mr. Dick Snyder, Mercury Marine, reference a summary of his presentation to the Subcommittee on September 22, dated October 6, 1988.

Collection of Propeller guard patents, compiled by Subcommittee member Montgomery, dated October 18, 1988.

Letter to Subcommittee Chairman Getz from NBSAC Chairman Garden, reference NEXUS data bank of published newspaper articles concerning propeller-related accidents, dated October 23, 1988.

Letter to Subcommittee Chairman Getz from Mr. Alex Marconi, OMC Senior Counsel/Litigation, reference response to the article "Motorboat Propeller Injuries" by orthopedic surgeon John Nordt, M.D. of Coral Gables, and other related matters, dated November 9, 1988.

Letter to Subcommittee Chairman Getz from Dr. D.F. Huelke, reference a summary of his presentation to the Subcommittee on November 14, dated December 19, 1988.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference his updated article on propeller guarding, dated January 23, 1989.

Letter to Subcommittee Chairman Getz from Mr. Dick Snyder, Mercury Marine, reference a clarification of his presentation to the Subcommittee on September 22, 1988 concerning USCG statistics, dated February 23, 1989.

Photographs of Dr. Thibault's Deposition Exhibits, OMC. ATS Glabman, April 13, 1989.

Letter to Alex Marconi, OMC Senior Counsel/Litigation, from Kelly J. Flood, reference transcripts of Swint and Bruton San Diego Test videos, dated April 17, 1989.

Personal Watercraft Accident Summary, compiled by Subcommittee member Kerlin, dated May 9, 1989.

Letter to Subcommittee Chairman Getz from Mr. Richard Snyder, Mercury Marine, reference a summary of his work with the U.S. Marine Corps delivered at the May Subcommittee Meeting, dated May 30, 1989.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference August 9, 1989 stunt man prop guard tests, dated August 11, 1989.

Letter to Admiral Paul A. Yost, Commandant, U.S. Coast Guard, from Mr. Benjamin Kelley, President, Institute for Injury Reduction, reference the Institute's recent news conference and subsequent questions for the Coast Guard, dated August 15, 1989.

Letter to Mr. Benjamin Kelley, President, Institute for Injury Reduction, from Captain W.S. Griswold, U.S. Coast Guard, responding to Mr. Kelley's August 15 letter to Admiral Yost, dated August 23, 1989.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference video tapes of a deposition of Dr. Charles Price (08/29/89), propeller guard segment on "CBS This Morning" (08/31/89), and prop guard demo (08/09/89).

Letter to Subcommittee Chairman Getz from the Biodynamic Research Corporation, reference an outline of Dr. Benedict's presentation to the Subcommittee in May, dated September 20, 1989.

Letter to Subcommittee Chairman Getz from Mr. Alex Marconi, reference a U.S. Marine Corps accident involving a propeller guard, with attachment, dated October 12, 1989.

Transcript of the deposition of Dr. Charles T. Price, M.D., dated August 29, 1989, submitted by Mr. R. Ben Hogan, III, November 4, 1989.

Packet of information provided to the Subcommittee by Mr. Benjamin Kelley, November 4, 1989.

Video Tapes, as follows:

Simulated Underwater Limb Impact Tests (SULIT), Mercury Marine, 1988, (21 min.)

Hirsch, Glover, Robinson & Sheiness, Hammonds vs. Yates, Marine Corps Raiders, (4 min.), Guard Operation by Snyder, (4 min.), Mercury and OMC Log Jumps, (4 min.), Ehrhardt Cage Test "Wynne", (6 min.).

Simulated Underwater Flesh Impact Test (Sausage Tests), Mercury Marine, (5 min.).

Chadwell Propeller Device On-Water Tests, Mercury Marine, (8 min.).

Sporting Life IRB's, New Zealand, (25 min.).

March 1989 San Diego Tests, and March 1989 San Diego Tests, Bruton Tapes, Underwater Video, High Speed Film, Speed Runs.

Institute for Injury Reduction news conference release tape, propeller injuries/propguards, June 1989.

Ben Hogan/stunt man propeller guard tests, conducted August 9, 1989 (2 tapes).

Deposition of Dr. Charles Price, dated August 29, 1989.

Propeller Guard segmant [sic] of "CBS This Morning," dated August 31, 1989.

APPENDIX D

Subcommittee Agendas

PROPELLER GUARD SUBCOMMITTEE MEETING
BOSTON WHALER FACILITIES – ROCKLAND, MA
SEPTEMBER 22 & 23, 1988

AGENDA

Thursday, September 22

8:30 AM – 9:50 AM	Subcommittee Welcome, Orientation, and Literature Review
10:10 AM – 11:00 AM	Presentation to the Subcommittee Mr. Richard Snyder – Mercury Marine
11:10 AM – 12:00 PM	Presentation to the Subcommittee Mr. Brian Chadwell – Propeller Guard Designer
1:00 PM – 1:50 PM	Presentation to the Subcommittee Mr. Ben Hogan – Attorney for Advocates
2:00 PM – 2:50 PM	Presentation to the Subcommittee Mr. Alex Marconi – Attorney for Outboard Marine Corp.
3:10 PM – 5:00 PM	Participation with the Subcommittee[:] Previous participants will give points, counterpoints, rebuttals to

other presentations, in addition to questions/answers with the Subcommittee

Friday, September 23

8:30 AM – 10:00 AM On-water propeller guard demonstration[:] Boston Whaler representatives will provide a boat with and without a propeller guard

10:20 AM – 12:00 PM Subcommittee review of newly presented information and plans for the future needs of the subcommittee, with a projected timetable for subcommittee work

The National Boating Safety Advisory Council

PROPELLER GUARD COMMITTEE MEETING
NEW BERN, NORTH CAROLINA
NOVEMBER 14, 1988

AGENDA

1. Presentation by D. F. Huelke. Professor of Anatomy, University of Michigan
2. Review of papers submitted by previous speakers.

   Blount
   Hogan
   Snyder
3. Review of Garden letter, dated October 23, 1988, Re: Nexus.

4. Review of Committee charges from September meeting.

   Getz .....Capt. Griswold letter
   Dr. Thiebault
   Kirlin.....U.S.C.C. Statistical Analysis
   Consumer Product Safety Commission
   David Taylor Model Basin
   Mongomery.....Patents
   Lexus
   Insurance Carriers
   Lincoln .....Robert Taylor Graphs
5. Future Committee Schedule.

PROPELLER GUARD SUBCOMMITTEE MEETING
COEUR D'ALENE, IDAHO
MAY 12 & 13, 1989

AGENDA

Friday, May 12

1:00 – 1:10 PM Review by Subcommittee Chairman

1:10 – 1:30 PM Presentation to the Subcommittee Mr. Richard Snyder – Mercury Marine

1:30 – 3:00 PM Presentation to the Subcommittee Mr. Robert Taylor – Failure Analysis, Inc.

3:15 – 5:00 PM Presentation to the Subcommittee Dr. Lawrence Thibault – Biomechanics, Inc.

7:00 – 9:00 PM	Presentation to the Subcommittee Dr. James Benedict – Biodynamic Research Corporation

Saturday, May 13

8:00 – 10:00 AM	Presentation to the Subcommittee Dr. Albert Burstein – The Hospital for Special Surgery
10:00 AM – 5:00 PM	Subcommittee Review/Report Assignments

August 2, 1989

Captain James E. Getz, Chairman
Propeller Guard Subcommittee
National Boating Safety Advisory Council
Illinois Department of Conservation
110 James Road
Spring Grove, IL 60081

RE: Boating Accident Statistics

Dear Jim:

I am sorry, but I became busy and forgot to send you hard copies of some of the material pertinent to my Propeller Guard Subcommittee presentation. Enclosed are several charts showing accident (Fatality and Injury) statistics reflecting general activities, boating and incidents involving being struck by "boat, propeller, or lower unit." Following are some comments regarding each chart.

Chart 1 "Accident Types" for Fatal Accidents for Boats with Motors 1976-1981

The average number of recreational boating deaths from 1976-1981 is 1,325 per year. Of all fatal accidents for boats

with motors 5.2% of the accidents involve being "struck by boat or propeller."

For the years presented, this amounts to an average of 49 fatalities per year associated with this accident mode. We know this number is higher than actual because we cannot subtract the subset "related to propeller contact" from those accidents where the individual was struck by only the boat or only other motor or steering appendages and not by the propeller. Estimates show that boating fatalities involving the propeller are probably closer to 30 per year.

Chart 2 Annual Fatalities

This chart indicates annually there are approximately two million deaths. The great majority of those deaths are associated with natural causes and disease. Only 5% of all deaths are premature accidental deaths. Nearly half of all accidental deaths involve motor vehicles. One percent of accidental deaths (1384 in 1980) are attributable to boating. Of these, approximately 30-49 incidents per year are associated with propeller involvement. On an absolute basis this is one third to one half the number of fatalities associated with being struck by lighting (94 in 1981).

Chart 3 Risk of Fatality by Activity

This bar chart depicts the relative comparative risk of fatality for various activities. Risk is computed by dividing the number of fatalities for a given activity or accident mode by the opportunities for the accident to occur. In this case, the opportunity is selected as one million exposure hours. An exposure hour is defined as one person spending one hour in pursuit of the activity. In other words, this chart shows the relative risk (or chance of fatality) for different activities if one spent an equal

amount of time (million hours in this case) in pursuit of that activity.

The risk of fatality on a per hour basis while boating, in general, is about one-fourth the risk of operating a motor vehicle and is comparable with the risk of flying in a domestic scheduled airline.

The risk of fatality of being "struck by boat or propeller" is one-third of the risk of traveling in a school bus for an equal amount of time.

Chart 4 Risk of Boating Fatality in 1981

This chart indicates that all boat types do not have the same relative risk of fatality. In fact, boats without motors (inflatables, rowboats, and canoes/kayaks) tend to be substantially more risky than boats with motors.

Chart 5 Rate of Boating Fatalities In Which the Accident Was Described As "Struck by Boat or Prop" 1975-1981.

This chart shows that even motor driven boats without external propellers (jet boats) are involved, on a per-boat basis, in a comparable number of "struck by boat" incidents.

Obviously, this fact demonstrates that in the real world there is no free lunch. Because jet boats have either no or minimal lower steering appendages, they tend to be more difficult to maneuver; consequently, jet boats are involved in collision type accidents. So, in this case, by eliminating one accident mode – propeller strikes – other accident modes have been created or increased – collisions.

Chart 6 Risk of Injury by Activity

This chart shows the comparative injury risk (non-fatal incidents) for various activities. Its derivation is similar to the Risk of Fatality chart. Hospitalized injuries related to propellers while boating or water-skiing are approximately one-half of one percent of the risk of injury while boating or water-skiing.

I would be pleased to elaborate on any of the above issues. If the committee has specific questions they desire to be addressed or if you need further explanation of the background or references for the summary charts, please call.

Sincerely,

/s/ Robert K. Taylor
Robert K. Taylor, P.E.
Managing Engineer
Naval Architecture & Marine Engineering

RKT:dg/getz.doc

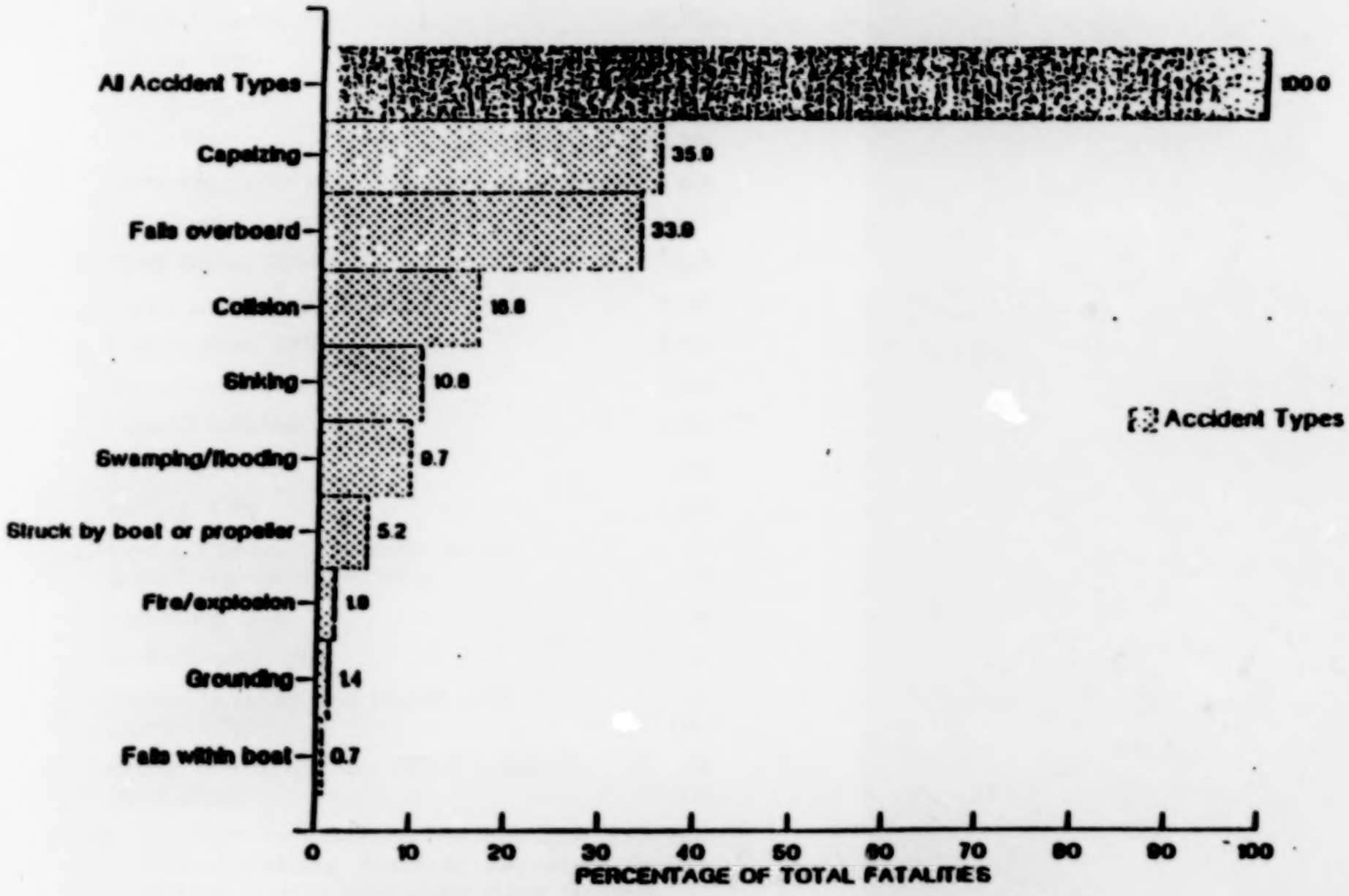
Enclosure
Charts (1 orig & 6 Color Copies)

———

APPENDIX E

Failure Analysis Associates Summary

"ACCIDENT TYPES" FOR FATAL ACCIDENTS
Boats with Motors, 1976-1981



Percentage includes cases with multiple accident types, therefore total exceeds 100%

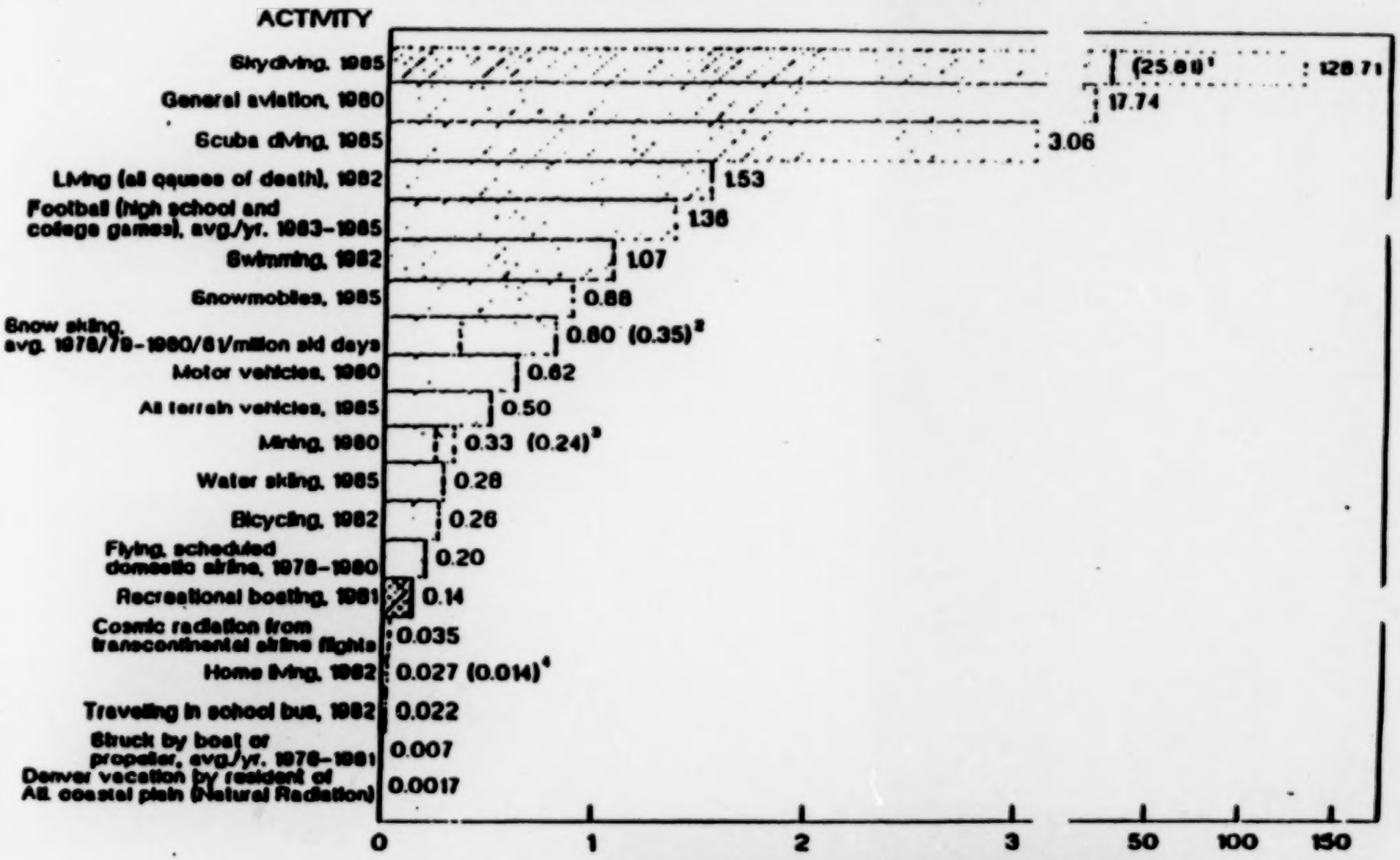
BEST AVAILABLE COPY

ANNUAL FATALITIES

All Causes, 1980	1,989,841
All Accidents, 1980	105,718
Motor Vehicles, 1980	53,172
Suicide, 1980	26,869
Homicide, 1980	23,967
Falls, 1980	13,294
Drowning, 1981	6,404
Swimming, 1981	2,513
Fires, Burns, 1980	5,822
Ingestion of Food, Object, 1980	3,249
Construction, 1980	2,500
Recreational Boating, 1980	1,384
General Aviation, 1980	1,237
Bicycling, 1980	965
Mining, 1980	500
Flying Scheduled Domestic Airline, annual avg. for 1978-1980	98
Lightning, 1980	94
Scuba Diving, 1980	89
Skydiving (Jump and Flight), 1980	47
(Jump Only)	(45)
Skiing, annual avg. for 1978/79-1980/81	37
(Raw Data)	(16)

Note: Fatalities for recreational boating from U.S. Coast Guard Boating Accident Reporting System (BARS), and includes water skiing fatalities.

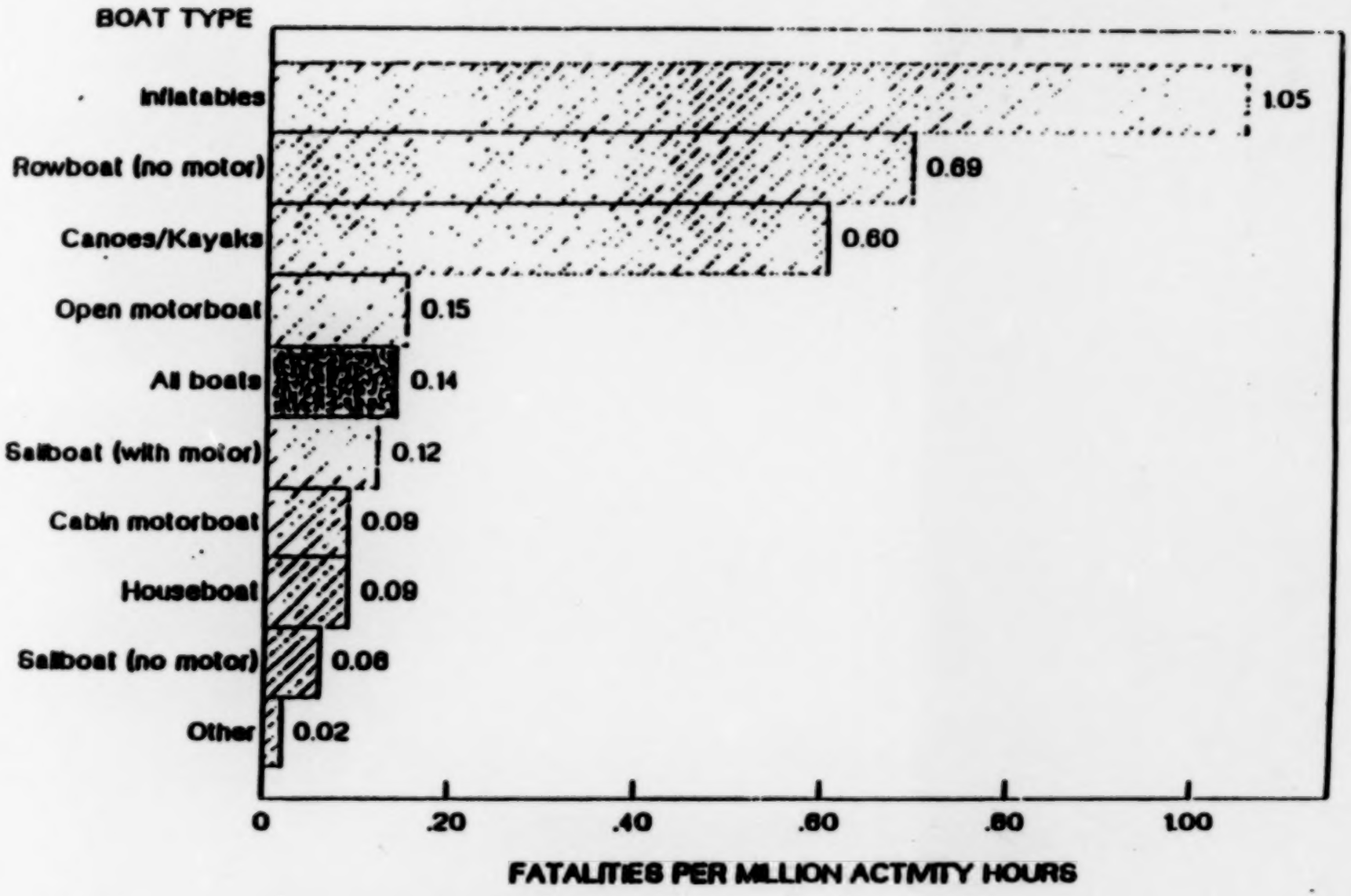
RISK OF FATALITY BY ACTIVITY



Note:
1. The risk for jump time only is 128.71. The number in parentheses, (25.8), is the risk for jump and flight time.
2. The number in parentheses is the risk calculated from the raw data only.
3. The risk for production workers is 0.33. The number in parentheses, (0.24), is for all employees.
4. The risk for active home living is 0.027. The number in parentheses, (0.014), is for active and passive time.
5. Values for some activities may vary from year to year.

Failure Analysis Associates

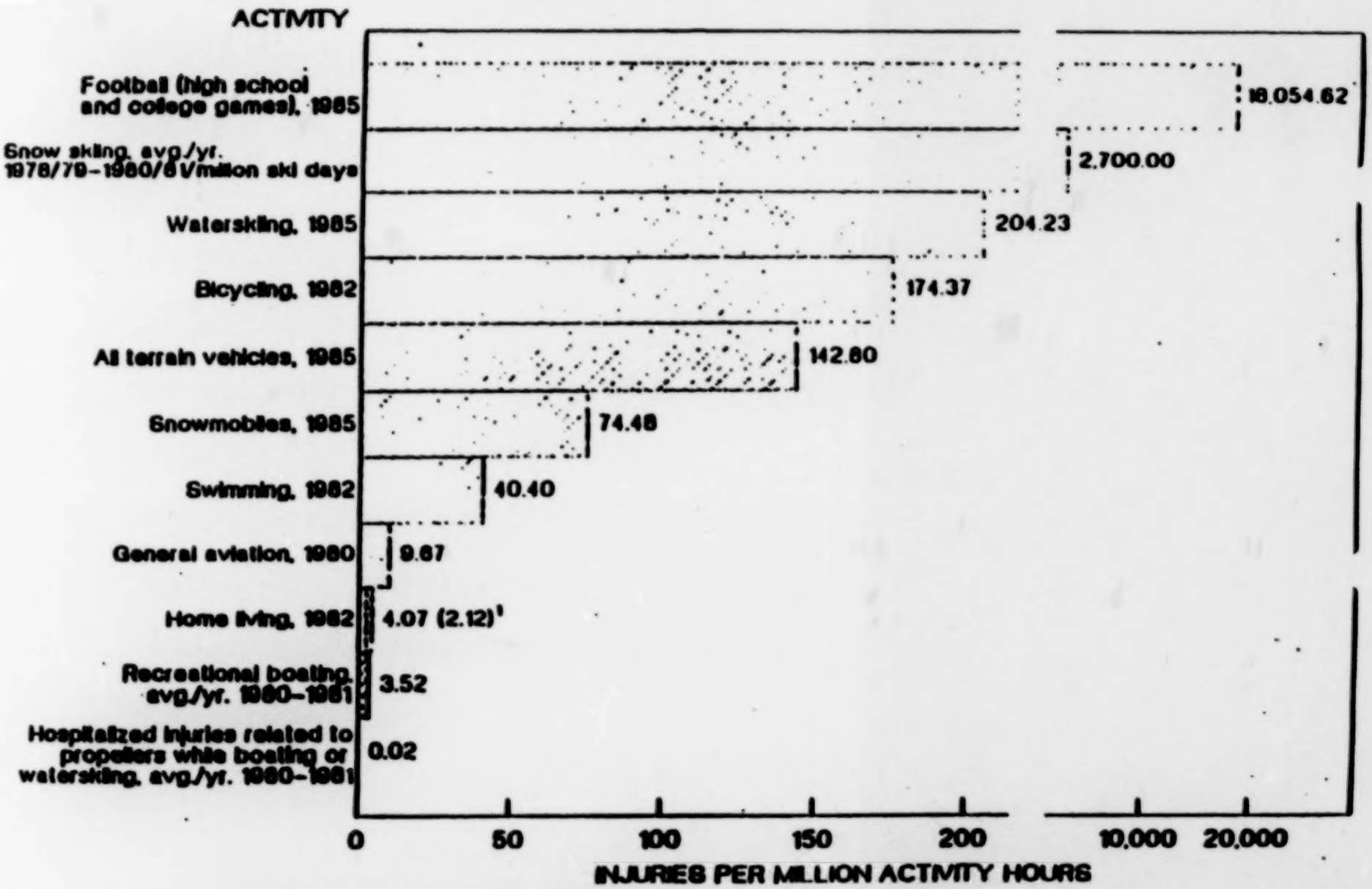
RISK OF BOATING FATALITY IN 1981



Note: Data from United States Coast Guard.

Failure Analysis Associates

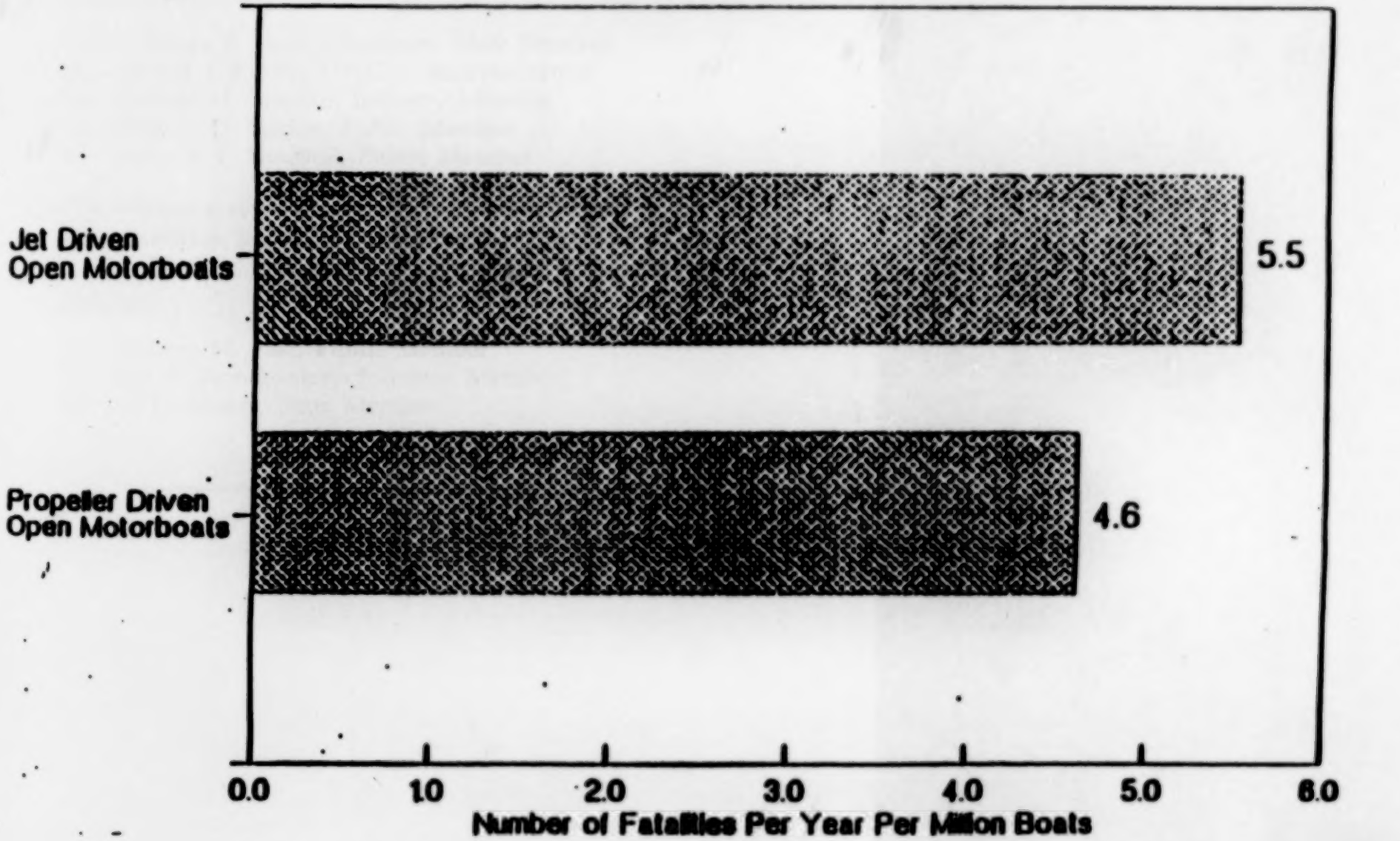
RISK OF INJURY BY ACTIVITY



Note:
1. The risk for active home living is 4.07. The number in parentheses, (2.12), is for active and passive time.
2. Values for some activities may vary from year to year.

Failure Analysis Associates

RATE OF BOATING FATALITIES IN WHICH THE ACCIDENT WAS DESCRIBED AS "STRUCK BY BOAT OR PROP" 1975-1981



APPENDIX F

Subcommittee Members

The following members participated in the Subcommittee's deliberations and consideration of conclusions and recommendations:

CAPT. James E. Getz, Chairman, State Member
Mr. Donald J. Kerlin, U.S.C.G. Representative
Mr. Richard H. Lincoln, Industry Member
Mr. William D. Selden, Public Member
Mr. Herman T. VanMell, Public Member

The following members served at various lengths on the Subcommittee, but were not on the Subcommittee at the time of the consideration of conclusions and recommendations:

Mr. William M. Fast, Public Member
Mr. Roy T. Montgomery, Industry Member
LT. Joe L. Ruelas, State Member

EXHIBIT 6

44th MEETING
OF THE
NATIONAL BOATING SAFETY ADVISORY COUNCIL
LAS PALMAN INN
INTERNATIONAL DRIVE
ORLANDO, FLORIDA
6-7 NOVEMBER 1989

Monday 6 November 1989

0800 – Meeting called to order by Chairman Garden.

A complete record of all Council proceedings is available on audio tape. For further information contact:

Captain W. S. Griswold, USCG
Executive Director
National Boating Safety Advisory Council
U. S. Coast Guard (G-NAB)
Washington, DC 20593-0001

Telephone (202) 267-1077 or Mr. Dean Klinger, Executive Secretary, NBSAC, at (202) 267-0997.

Council Members Present

Mr. A. Newell Garden, Chairman
Mr. John E. Bishop, Sr.
Mr. M. S. Blackistone
Mr. Robert E. Brightbill
Mr. Paul E. Donheffner
COL Donald N. Ellingsen
Ms. Yvonne S. Ferrell
Mr. E. Charles Game
CAPT James E. Getz
Mr. Philip Haseltine
Mr. Richard H. Lincoln
Mr. Robert F. MacNeill
Mr. Roy T. Montgomery
COL David E. Scott
Mr. William D. Selden
Mr. Al Simon
Mrs. Charlotte Toups
Mr. Eric A. Tulla
Mr. Herman T. Van Mell
The Honorable Chandler L. van Orman
LT Michael Vinton

Council Members Absent

NONE

U. S. Coast Guard Headquarters' Representatives Present

CAPT W. S. Griswold, Executive Director, National Boating Safety Advisory Council (NBSAC) and Chief, Auxiliary, Boating, and Consumer Affairs Division, Office of Navigation Safety & Waterway Services; Mr. Dean E. Klinger, Executive Secretary, NBSAC; Mr. Donald Kerlin, Chief, Product Safety Assurance Branch; Mr. Richard Bergen, Chief, Consumer and Regulatory Affairs Branch; LT Randell Sharpe, Merchant Vessel Inspection and Documentation Division, Office of Marine Safety, Security and Environmental Protection; Commander Tom Meyers, Executive Director, Rules of the Road Advisory Council, Office of Navigation Safety & Waterway Services.

WELCOME TO FLORIDA

COL Don Ellingsen, Director, Florida Marine Patrol and Council Member, welcomed the Council and guests to Florida, the Sunshine State.

SWEARING IN OF NEW MEMBER

CAPT Griswold swore in LT Michael Vinton as a new member to fill the unexpired term of LT Joe Ruelas. The new member was introduced as follows:

Lieutenant Vinton was born in Newport, Vermont. He is a graduate of the FBI's National Police Academy.

From 1964 to 1966 he served as a patrolman for the Burlington, Vermont Police Department. In 1966 Mike

became a Vermont State Trooper. His assignments to date include: Governor's Security Detail for three years, Chief Polygraph Examiner for ten years, Station Commander for five years and Marine Division Director for the past five years. He serves as the State Boating Law Administrator.

LT Vinton is a past president of both the Bluch Hill Country Club and the Harwood Youth Hockey Association.

MEMBERS' ITEMS

Chairman Garden relayed his concern about recent advertisements for thrill craft which are small vessels with raised saddle seating, handlebar steering, propelled by powerful outboard motors. The ads also state that these craft are exempt from all Coast Guard construction standards.

Mr. Brightbill remarked that many boat manufacturers are changing Hull Identification Numbers (HINs) on boats that are not sold during a particular model year in order to make them the next year's model. He wanted to know how these boats will be tracked down in the event of a safety recall.

Mr. Donheffner asked if there will be an update on the status of regulations.

Chairman Garden replied that it is on the agenda.

COL Ellingsen said that he is concerned that the current Coast Guard standards for horsepower and capacity only apply to mono-hulled boats under twenty feet in length. He would like them to be expanded to include up to

twenty-four or twenty-six feet in length. He is also interested in hearing about the blue light issue.

CAPT Getz was concerned with the annual funding problems for the Federal Grant Program. He wanted to know if there will be a procedure whereby the Coast Guard and the States each receive the percentage of these funds as prescribed by Congress.

Mr. Haseltine remarked that everyone should be vigilant to insure that the Boating funds are not taken and used for other purposes.

Mr. Lincoln relayed a concern about a past recommendation by the boating safety education subcommittee that the Coast Guard develop a comprehensive boating education plan involving the States, industry and everyone associated with boating. Mr. Lincoln was also concerned about the lack of sufficient funds for the subcommittees to do their work between Council meetings.

Chairman Garden told Mr. Lincoln he shares his concerns on funding.

Mr. MacNeill told the Council that the Rules of the Road Advisory Council's charter has changed. They are now known as NAVSAC. He would like an update on the status of this item.

Mr. Simon told the Council that the State of Maryland recently held dedication services for its first pump out station. He wanted to know if there is a possibility that the Coast Guard will standardize the fittings for pump outs for recreational boating. His other concern is a request for the Coast Guard to standardize buoy colors to indicate speed zones.

Mr. Tulla told about his recent experience with hurricanes in Puerto Rico. He feels it is imperative to educate boaters to evacuate boats during impending hurricanes. He would also like to have access to information as to the proper way to anchor a boat in preparation for a storm.

Mr. Garden informed the Council that last summer Jim Ellis, from BOAT/US, put out some excellent literature on hurricanes.

Mr. van Orman told the Council that one year has passed since the Council passed a resolution recommending that the Coast Guard expand their boater safety education involvement. He would like to know what specific steps the Coast Guard has taken to date, what initiatives it planned to take and what money, if any, the Coast Guard has spent implementing the recommendations of his subcommittee.

LT Vinton said his concerns are the same as those of CAPT Getz.

EXECUTIVE DIRECTOR'S REPORT

CAPT Griswold relayed regrets from Admiral Nelson as he is attending a Coast Guard Flag Conference (all the Admirals) is Gettysburg, Pennsylvania. The Captain reported that his Auxiliary, Boating and Consumer Affairs Division's environment in headquarters has stabilized. His Division's move has been completed and most of his previous concerns of the move have been resolved. Four new employees have been brought on board for the State Affairs Branch. Each one is assigned a NASBLA region and is now working with the BLAs of those States

on their grant program. He is hoping to acquire a secretary for that Branch. The Executive Director said that he has a request in asking for five additional employees. One new position will be clerical, two will go to Hunt Anderson's Education Branch and the other two will go to Don Kerlin's Standards Branch. He feels that recreational boating is bouncing back. He said that Captain Al Rosebrook has been assigned to the Division for a two year period and is now working on special projects and also trying to help the four new State Affairs employees. Captain Griswold informed the Council that $1.5 million has been set aside for non profit grants. He reported that 52 proposals had been received from 27 organizations totaling $6.3 million worth of projects.

Nineteen projects have been selected and he feels that the Coast Guard will be getting some outstanding projects done as a result. One of the grants will go to BOAT/US for an inflatable PFD study. Another will go to the National Water Safety Congress to review and salvage outdated Coast Guard boating safety films. A boating collision study will be done by UL for a grant project. One grant was awarded to compare boaters who took safety courses with those who didn't. Captain Griswold said that managing these grants is becoming a very large burden on his staff and he will need to seek some type of assistance. He said that all indicators point to full funding for the State programs for next year. The Executive Director reported that user fees are still a hot issue and that everything possible is being done to discourage the implementation of them. He reported that there is a possibility that accident fatalities are running slightly ahead of last year's pace. He hopes that with the increase in the

number of boats, the rate will not rise. He commended the Council and other organizations for attaining this excellent boating safety record. Speaking on Blue Lights for the Auxiliary, the Captain explained that the law enforcement community was opposed to the Coast Guard's proposal to test the use of these lights for Auxiliary vessels. The tests were called off prematurely basically because many authorities want to keep blue lights to identify law enforcement vessels only. The possibility of using an orange/red flashing light for special events by Auxiliarists is now being looked into.

COL Ellingsen told the Captain that he thinks the Auxiliary will get plenty of support for an Orange/Red light, anything but Blue.

CAPT Griswold reported that the Coast Guard will conduct a trial project that allows inflatable TYPE I PFDs to be carried on certain commercial vessels. The Executive Director proposed to the Council that a subcommittee be formed to look over the operation of Consumer Affairs and Product Assurance in his Division. He stated that the Commandant has formed a special task force to review the Coast Guard's boarding procedures. He congratulated the BOAT/US Foundation for coming up with over $35,000 for 19 groups to gather information. National Safe Boating Week, which was held the week of June 4, 1989, will be reported on by Bill Ladd. The Captain reported that the Coast Guard Auxiliary was able to do a Courtesy Marine Examination (CME) on the President's personal boat, "Fidelity". The entire procedure was videotaped and portions will be used as public education promotional spots. Captain Griswold announced that the Auxiliary had just celebrated its 50th anniversary this summer.

They appear hale and hearty and ready for another 50 years of work. He also said that the United States Power Squadrons just celebrated their 75th anniversary by flying their flag in a space shuttle as well as all around the world. He reported that some recreational boating safety hearings were held before the House Merchant Marine & Fisheries Committee's Subcommittee on the Coast Guard and Navigation last May. The purpose for the hearings was two-fold. First they received testimony from Federal, State and local representatives on budgetary concerns about funding of the Boat Safety Account as well as comments on the Administration's proposal for user fees on commercial vessel operators and recreational boaters. Other organizations registered their strong opposition. Secondly, the Subcommittee addressed safety concerns such as boating while intoxicated, boater safety education, personal flotation devices and personal watercraft issues. Some other issues that were brought up were carrying passengers for hire, Coast Guard boardings, numbering all vessels and defects. The meetings were chaired by Subcommittee Chairman, Congressman Billy Tauzin and attended by Congressman Bob Clement.

RADM William Eckert, commander, 2nd Coast Guard District, was accompanied by Commodore Bill Schulte, Coast Guard Auxiliary and Mr. (illegible) Marmo from Headquarters as Coast Guard witnesses. The Army Corps of Engineers was represented on the Federal panel. There was also a State panel, National Organization panel, Industry panel, and a Waterways Operations panel. The Captain reported that there are now 34 States with a Blood Alcohol Standard. He added that Maine joined

Utah this year with a BAC level of .08%. A copy of the summary of State BAC Laws is attached as Enclosure (1).

NEXT MEETINGS

CAPT Griswold announced that the next Council meeting, no. 45, will be held in Denver, Colorado on May 12-15, 1990. Subcommittees will meet on Saturday the 12th and the full Council will meet Monday & Tuesday, 14 & 15 May, 1990. Meeting number 46 has been tentatively scheduled for November 10-13, 1990 in San Diego, California. Both meetings will be held over weekends in order to allow members to utilize the lower air fares.

Mrs. Toups informed the Council that the Coast Guard began its 200th year of service on August 4th of this year. She also stated that Congressman Tauzin is a recreational boater and is a very good listener.

Mr. Game stated that he had hoped to hear more on the impact of the new MARPOL regulations on the recreational boaters, especially as it affects the discharge of garbage. He was also concerned about the September 15, 1989 Federal Register Notice on proposed Vessel Identification Systems.

CAPT Griswold reminded the Council that it had been briefed on that project at the previous meeting and progress is being made. The public comment period will close on December 14, 1989.

UPDATE ON NATIONAL BOATING SURVEY

Dr. Susan Blake, Project Manager, American Red Cross, gave the Council a status update on the national boater survey that she is conducting. The purpose of the survey is to provide reliable, useful information on boating safety that will be of use to educational planners. The objectives were to provide national estimates of the number of boats and the number of boaters that exist in the country, boating exposure (types of activities, which waters and how long people are boating per year). She is also trying to get a handle on critical incidents which are not only accidents but also near misses that are life threatening. Dr. Blake told the Council that she wants to do a comparison on boat sizes and boat types as well as to get a full set of demographics to help understand more about the boater. She also expects to collect information to verify that the Coast Guard is receiving reports on about all of the fatal accidents but only about 10% of those required to be reported property/injury accidents. The present survey results will be checked with survey results from 1973 and 1976 for comparability. She said that this survey is being conducted by using random sampling. The two previous surveys contacted boating households only. The goal is to survey 5,000 households. To date about 600 have been contacted.

Mr. Lincoln asked if this is a telephone survey.

Dr. Blake replied "yes, a random survey by phone".

Mr. Lincoln asked if any results are in yet.

Dr. Blake said "not yet, its still too early".

Mr. Lincoln asked how long it is expected to take to complete one interview.

Dr. Blake answered that the full survey takes about 35-38 minutes to complete.

Mr. Ladd asked how the accuracy of 5,500 interviews can be compared with the accuracy of 25,000 interviews in the previous surveys.

Dr. Blake replied that about 25,000 people will be screened in order to get 5,500 households for the complete set of questions, which would compare with previous surveys.

CAPT Getz asked when the survey will be completed and what is the planned distribution of the written results.

Dr. Blake responded that interviews will continue into December. It is expected to take several more months to complete the written report and final distribution will be left up to the Coast Guard to decide.

Chairman Garden asked how many people at the meeting were asked to look at a preliminary copy of the survey questions. (Three hands were raised, making it a total of four including himself).

COL Ellingsen asked why boating registration lists are not being used to contact boaters for this survey.

Dr. Blake explained that by doing so it would become a biased survey because the States do not all have identical registration laws. Some require all boats to be registered while others only require motorboats to be registered.

NAVIGATION LIGHTS SUBCOMMITTEE REPORT

Mr. MacNeill, Subcommittee Chairman, informed the Council that his committee's charge was to determine whether or not the change to Rule 23 of the COLREGS, to permit the masthead light to be located aft of amidships on recreational power vessels, could be made without adversely affecting navigation safety. The subcommittee was to consider: (a) problems with complying with current regulations, (b) safety problems with current masthead light locations and (c) alternative masthead light placement that would solve the physical mounting problem, solve possible glare problems and provide visibility intended by COLREGS. He said it has been demonstrated that nearly all major boat manufacturers ignore the light placement portion of this treaty. Talking about safety problems he said that there are two questions remaining to be answered. They are, (1) will allowing a masthead light moved aft of amidship affect one's visibility to distinguish the size and aspect of another boat? and (2) Exactly how much does the glare and backscatter affect one's ability to see ahead of his or her vessel at night? Specifically, (a) Can we see the light on an aid to navigation better without a forward masthead light on, and if so, by how much? (b) How much is our dark-adaption (night vision) affected by the glare and scatter of the forward masthead light? If it is affected, how much has it affected our ability to see another vessel or a navigational aid at night? Mr. MacNeill said the subcommittee cannot answer these questions because it lacks the necessary expertise. Therefore, he has requested funding to continue research efforts. In response to this request, assistance from the Coast Guard's R & D Center is being

sought. The Center has a vision scientist on board who will do a study in Spring. Mr. MacNeill feels that some of this research on glare has already been done and could possibly be found by a competent literature search at a cost of about $5,000. He feels that a change in the navigation rules (COLREGS) must take place to correct part of this problem. The next IMO meeting will be in September of next year. It is the Coast Guard's responsibility to request agenda items through the Department of State. Therefore, the subcommittee recommends that the Coast Guard: (A) Attempt to rearrange the R & D Center's priorities to provide the research necessary prior to the May NBSAC meeting and (B) Secure funding to perform a proper literature search.

Mr. MacNeill reported that he had taken the NBSAC resolution to the RORAC meeting and got the following response from their chairman.

1. RORAC has considered NBSAC's proposed resolution of May 11, 1989 and the additional information provided at its meeting on Wednesday, November 1, 1989.

2. The Coast Guard is proceeding with its research and development studies of the safety concerns raised by the proposed resolution. RORAC will await the results of these studies before making recommendations as to whether or not existing COLREGS and Inland Rules should be changed. These results should be available to RORAC by the time of its next scheduled meeting in May, 1990.

3. RORAC presently does not accept the validity of many of the assumptions and suggested technical conclusions used as a basis for the actions being recommended by NBSAC.

4. Pending the receipt of the results of research & development studies RORAC has requested the Coast Guard to seek information as to what other countries are doing with permits which permit the construction and use of recreational vessels in violation of COLREGS Rule 23(a)(i). Likewise RORAC encourages NBSAC to explore its formal and informal channels to foreign manufacturers to seek to develop similar information.

5. When this issue subsequently comes before RORAC, it will attempt to consider all relevant factors including in this case, perhaps, the international competitive market. However, RORAC's recommendations ultimately must stem from consideration of safety and not merely aesthetics.

6. RORAC believes that in the case of vessels 20 meters in length or longer, the factor of navigation safety far outweigh any other consideration and dictates that a masthead light be displayed *forward* on such vessels. Therefore, even if RORAC ultimately determines to recommend that the U. S. proposes to IMO an amendment to the COLREGS such amendment should be limited to vessels less than 20 meters in length. Accordingly, it is not envisioned that any amendment to Inland Rule 23(a)(i) will be required.

7. This committee recommends that this proposed response to NBSAC be adopted as a RORAC resolution (it was).

8. Unanimously agreed: That Certificate of Alternate Compliance (CAC) procedures are not applicable to pleasure or recreational type vessels solely on the basis of style, design or marketability. (This is based on the long-standing language and intent of COLREGS Rule 1.)

Mr. MacNeill recommended that his committee should continue working on the perceived light problem and not turn it over to RORAC because they only deal with problems of commercial shipping and do not fully recognize the needs of the millions of recreational boaters. He did recommend that future subcommittee meetings have participation by representatives of RORAC.

The Committee recommends:

A. That the Coast Guard adjusts the R&D Center's project priorities so that an appropriate glare study can be performed prior to the May NBSAC meeting; and

B. That the Coast Guard fund an independent literature search on the subject of degradation to dark adaption or night vision from backscatter from a masthead light and direct glare from an all around white light. (The two research efforts should be completed prior to the next NBSAC meeting in May, 1990 so that the problem can be taken to IMO.)

C. That the Coast Guard establish a joint NBSAC/NAVSAC navigation light committee and arrange for a meeting after the results of the research are known and prior to the scheduled May NBSAC/NAVSAC meetings.

D. That the Coast Guard request the Department of State to put the navigation light issue on IMO's agenda for their September meeting.

COL Ellingsen commended the subcommittee on their outstanding report and said that he strongly recommends that they continue their work.

Mr. Game told the Council that it is very important to keep this as a priority project, not only in the Coast Guard, but also with NBSAC.

CDR Meyers, Executive Director, Rules of the Road Advisory Council (RORAC) told the Council that his Council would be the appropriate one to act upon this item. He stressed the fact that RORAC does not only represent commercial shipping. It is well balanced and does consider recreational boating concerns.

Mr. Lincoln said he is not aware of any members on RORAC that are representatives of the recreational boating industry.

MOTION: That the Council concurs with the subcommittee's report.

VOTE: – IN FAVOR – UNANIMOUS.

SUBCOMMITTEE ON ACCIDENT REPORTING

COL Ellingsen Subcommittee Chairman, told the Council that his group met on Saturday afternoon to discuss several items. The original charge to the subcommittee was to review the present procedure for reporting accidents by consulting with NASBLA and others in the reporting chain. After considerable discussion with the committee and NASBLA's BAIRAC (Boating Accident Investigation, Reporting and Analysis Committee), it was decided that the major insurance carriers could be most helpful in attaining more accurate information. To date these two committees have been unsuccessful on this matter. He said that Captain Griswold has appointed a retired insurance executive, who is a member of the Coast

Guard Auxiliary, to work with the industry. COL Ellingsen told the Council that a letter had been sent, along with a questionnaire, to the American Institute of Marine Insurance Underwriters on June 23, 1989 signed by both himself as chairman of this committee and Mr. Jim French who chairs NASBLA's BAIRAC. The letter pointed out the problem to the association and asked for their assistance by basically not handling a marine claim unless it has been properly reported to the government. He said that the industry did not accept the recommendations as they had hoped they would. However, there is a little light at the end of the tunnel as this subject will be further discussed with the industry prior to the NASBLA meeting in New Orleans in December. He said that the American Institute of Marine Underwriters represents approximately 20 insurance companies which, in turn, represent about 80% of the entire boating insurance business. He said that most marine surveyors have been informed about the State and Federal accident reporting requirements. He briefly described the seminars that are being conducted by Underwriters Laboratories for marine accident investigators. The Colonel remarked that the States are being encouraged to investigate as many boating accidents as possible. He said proper analysis of accident information is necessary in order to have proper corrective measures taken. COL Ellingsen said that he has had seven personal watercraft accidents investigated so far this year in Florida. Six were fatal and one resulted in serious injury. He reported that UL has also been given a grant to conduct further research into accident reconstruction to basically acquire a data base for an accident investigator to use. He mentioned that UL is also doing a

poster campaign pointing out that there is a law requiring that boating accident reports be properly filed. He concluded by recommending that the subcommittee be discharged at this time even though its final report will not be written until after the upcoming meeting with the insurance executives.

CAPT Getz suggested that it would be better to just declare the subcommittee inactive until such time as the final report is issued.

MOTION: That the subcommittee report be accepted and that it be declared inactive and subject to recall.

Chairman Garden declared the motion unnecessary as the subcommittee is planning to give its final report at the May 1990 Council meeting.

Self introduction of guests. List is attached as Enclosure (2).

BREAK

REVIEW OF DEVELOPMENTS IN PFDS

Mrs. Susan Balistreri a consultant in the field of PFDs and the founding chairman of the Personal Flotation Device Manufacturers Association, briefed the Council on the manufacture and marketing of PFDs. She explained the evolution from the original method of manufacturing and approving of PFDs to the present day system. Originally all the details of manufacture were spelled out in the Federal Register for the TYPE I device as were the details for the TYPE II device when it became available. When the TYPE III device originally appeared it was only acceptable as excess gear on board pleasure boats. She

said that it was after the passage of the Federal Boat Safety Act of 1971 that standards for Personal Flotation Devices became performance oriented and the Underwriters Laboratory Marine Division was formed. She told the Council that part of her job as a consultant is to help manufacturers improve the performance of their PFDs. Mrs. Balistreri remarked that it is the placement of the buoyant material rather than the total amount of buoyancy that affects the performance of PFDs. She said that any flotation material that is above the waterline of a person is useless.

With the help of her daughter, a variety of PFDs were displayed and their features were explained. She reported that her association is presently engaged in what should be a partnership with the boating community by printing pamphlets and brochures to help educate the consuming public concerning PFDs. It is her belief that customization of various devices will be the way of the future.

Ms. Ferrell asked if the color orange as a visual indicator for PFDs has been replaced by other considerations.

Mrs. Balistreri replied that the original International Orange colored units were designed for offshore boating where there is a need for a device reliable enough for long term rescue. This color has been compromised for inland boating to allow the devices to be more eye-appealing and in turn be worn more.

Mr. Game told the Council that he had a hard time trying to purchase ski vests of a contrasting color for his family.

Mrs. Balistreri answered that the manufacturers certainly do not discourage orange or yellow ski jackets, its just that people prefer to buy other colors.

Dr. Blake asked if the industry ever tried to make PFDs with the new reflective colored materials.

Mrs. Balistreri replied "Yes". However, there are Coast Guard UV (Ultra-Violet) requirements which have to be met and to date none of these materials appear to meet them. The industry is currently working on this.

Mr. Blackistone remarked that the industry should push the safety aspect of having contrasting colors on ski vests in the pamphlet and other marketing methods.

Mrs. Balistreri assured the Council that she would relay the information to her association members.

Mr. Game remarked that "safety" can be and should be a sales feature.

Mr. Selden said that he feels that we are on the right track. However, wearability must be the highest priority.

Mr. Haseltine told the Council that research has proved that older persons have a harder time differentiating between colors than young persons.

Mrs. Toups told the Council that everybody is right. She stated that hunters will absolutely not wear an orange PFD over camouflaged hunting clothing.

Mr. Tulla remarked that a toddler wearing a blue collared PFD is extremely hard to spot in the water. He would hesitate to even think about selling that color because of safety concerns.

STANDARDS UPDATE

Mr. Donald Kerlin, Chief, Product Safety Assurance Branch, told the Council that the proposed manufacturer/dealer first purchaser regulation has been underway since 1977. This regulation would now require dealers to participate in obtaining information on the first purchaser in order to help the manufacturer to maintain an accurate list to be used for notification in the event a safety defect recall is necessary. He said that the reason progress has not been made on this project is because of the paperwork reduction program. A subsequent Inspector General's Report chided the Coast Guard for the seemingly low percentage of first purchaser notifications in the event of a safety defect recall campaign. He said that the manufacturers blame this poor notification on the fact that dealers are not required by law to forward first purchaser information to the manufacturer. Additionally, comments were also received from the Government Accounting Office (GAO) on this project. A supplementary Notice of Proposed Rulemaking was published and drew a large number of negative comments on the proposed changes. He said that using a Vessel Identification System for recall purposes will not be possible for several years. Mr. Kerlin remarked that by using a Coast Guard/State registration system, only owners of boats required to be numbered would be included. A system would have to be devised to track owners of unnumbered boats, motors and sterndrives. The other alternative is to continue with the project as written. If this method is chosen it will be necessary to address two problems. (1) Inflatable boat manufacturers (mass merchandisers and importers) and (2) Trolling motors. These groups feel that the

proposed regulations are too burdensome and costly in relation to their products. Additionally, the total paperwork requirement may be too burdensome to meet current standards. Mr. Kerlin asked the Council if they feel that some inflatable boats and battery powered trolling motors could be exempt from the proposed first purchaser regulations.

Mr. Haseltine asked what types of boats are involved in most recall campaigns.

Mr. Kerlin answered that most recalls involve boats in the 16-18 ft. length category. He said that to the best of his knowledge there has never been a recall involving either inflatables or trolling motors.

Mr. MacNeill remarked that care must be taken in differentiating between construction material for inflatables.

Mr. Montgomery said that he would recommend that any boat designed to be powered by a motor should be included in a first purchaser regulation.

Mr. Donheffner asked about the scope of the current first purchaser regulation.

Mr. Lincoln informed him that it covers boats, outboard motors, and stern drive units.

Mr. Kerlin said that he got the feeling that the Council agrees with excluding trolling motors but feels that extreme care must be taken in further regulating the inflatables. He will be expecting a firm proposal from the Council at the next meeting.

Mr. Kerlin continued his presentation by informing the Council that there are no new standards in the offing. He

introduced Mr. John Hannon from the Merchant Vessel Inspection Division at Headquarters, as the liaison person between the offices of "M" and "N". It is Mr. Hannon's office that coordinates the field offices that are charged with the factory visit program. A comprehensive report on factory visits should be ready by the next Council meeting. He also introduced Greg Shafer from Tampa and Dave Gaul from Jacksonville as members of the Coast Guard's current marine safety program.

Mr. Lincoln spoke briefly about the required use of "Certified" mail to notify the first-purchaser in the event of a safety defect recall campaign. He said that he realizes the industry did not come up with sufficient justification to change the current regulation, however, he still does not like it.

Mr. Kerlin replied that it's not a totally dead issue. He's still waiting for information from the industry to further pursue it.

Mr. Montgomery told the Council that his company's experience shows that "Certified" mail is just not working because too many are being returned as undeliverable.

Mr. Lysle Gray informed the Council that several years ago the Coast Guard legal office rendered an opinion that without the use of "Certified" mail there would be no proof of attempt to notify a customer about a safety recall. He said that a company could send out notification using regular mail and in the event of no response at that point use "Certified" mail.

Mr. Kerlin spoke briefly on the updating of "Subchapter T". He said that in addition to receiving numerous written comments, the Coast Guard also held six public hearings. These comments are being considered and a Supplemental Notice of Proposed Rulemaking will be issued around September, 1990. He will try to have a status update for the May meeting in Denver.

Mr. Game suggested that a person be appointed to follow progress on this subject.

Mr. Donheffner asked if any progress is being made on deleting the acceptance of the TYPE IV PFD.

Mr. Kerlin replied that he will look into it.

Mr. Lincoln told the Council that he feels that someone should be actively studying the safety facts of alcohol blended fuel upon the marine industry.

Mr. Kerlin assured the Council that the Coast Guard is actively monitoring this subject and will keep it advised if any developments take place.

LUNCH

PLANNING FOR THE FUTURE OF BOATING EDUCATION

Mr. Hunt Anderson Chief, Boating Education Branch, told the Council that education has been an evolutionary process and he hopes it will continue to be so as far as boating safety is concerned. He said that the fact that there are not only more boats in use but there are also more powerful boats in use indicates that boating education must be altered in how we contact people. Mr.

Anderson said that he is tasked with managing what some people refer to as the National Boating Safety Education Program. He works with Federal Government agencies such as the Army Corps of Engineers, NOAA, FTC, Park Service and the Fish & Wildlife Service, etc. He also works directly with 35 national non-profit organizations, a good number of the States, academic institutions and the industry. He said that the past philosophy has been that anything is better than nothing. However, he is now trying to get better organized. There is a core of basic boating information that is taught as a part of most operator training whether it is for:

> Public education programs taught by a State or a nonprofit organization, like the Coast Guard Auxiliary or the U.S. Power Squadrons,
>
> Vessel operator qualification courses like the Army Corps of Engineers is developing.
>
> Marine law enforcement training programs such as the National Boating Safety Course offered at RTC Yorktown and those offered by some States.
>
> Train the trainer programs for the instructors of any of the above programs.

There is a need to enhance the training aids used to teach this basic core information. We are trying to encourage different parts of the boating community to develop training aids for different subject areas within the core. At this time there are a few grant programs and joint venture projects between the Coast Guard and industry that are beginning to yield some useful training videos. The Boating Education Branch is trying to act as a clearing house and point of contact for technical review of these efforts.

He added that it is necessary to avoid duplication among the different organizations involved with boating education. Mr. Anderson explained the use of grant guidelines to avoid pitfalls in the Coast Guard's grant program. It is intended to have the finished grant products adaptable so that, with minor modification, they can be used for several audiences. A better quality product is the bottom line.

Mr. Montgomery asked is there is a document presently available which can be used to evaluate a grant.

Mr. Anderson replied "yes" but it is not ready for general distribution.

Speaking on new educational products, Mr. Anderson mentioned the U.S. Power Squadron's new video boating course.

Mr. Selden (Chief Commander, USPS) described the new program which was started on May 1, 1989 and is now in the marketplace. It is an 80-minute video covering their 6-lesson boating course, which is really their 12-session course which was compressed and had radionavigation added. A 240 page book is included in the package to cover items that are not conducive to video. This program is designed to be comprehensive enough so a person who either uses the tape or attends the 6-session class should be able to pass the examination for qualification. The price of producing this package was $450,000 with no cost to the Power Squadrons. The package is being sold for the retail price of $39.95. The film was recently the winner of the gold medal at the Chicago Film Festival. Additionally, the package does meet the standards of the National

Association of State Boating Law Administrators' model course on boating education.

Mr. Anderson told the Council that the Corps of Engineers has a training program to certify their employees as boat operators. In the area of joint adventure projects, he mentioned that the Kilgore Corporation has done a project on flares that can be used in the classroom. He also praised the Kawasaki Corporation for producing and distributing a video on personal watercraft safety. He said that the National Water Safety Congress will review all available boating safety films and catalog them with comments as to their usefulness. He concluded by saying that he has the results of an anchoring study and will try to put the information into a readable pamphlet.

REPORT OF THE PERSONAL WATERCRAFT SUBCOMMITTEE

Mr. Blackistone, Subcommittee Chairman, told the Council that his subcommittee was charged to look at a number of items related to personal watercraft. The basic question that was looked at was whether the Coast Guard should come up with new regulations or if it should be left to the States to regulate these craft. He reported that over 200,000 of these units are now in use and their popularity is increasing rapidly because the consumers believe that they are fun. Mr. Blackistone reported that to date all of the units in existence seem to be good quality products. The current problems seem to be linked to the operator side of the issue. He said that personal watercraft are a target of the media because they are good press and a target of the residential community because

they are annoying. Both of these issues are growing. He believes that there are three dimensions to the personal watercraft: The owner, the renter, and the borrower. He remarked that the average unit is used by as many as five or more different people.

The subcommittee delivered the following recommendations:

1. That the Coast Guard should continue to encourage and support educational initiatives including print, visual, and audio as well as PSA's to targeted groups.
2. That the Chairman of NESAC communicate with the president of NASELA the importance that accidents be analyzed for involvement by owners, renters and borrowers of personal watercraft with the goal of targeting that audience. In addition the NASBLA should be encouraged to include material on personal watercraft in their State boating program. Another recommendation would be that NESAC concurs that the minimum age for operating these units should be 16 years.
3. That the Coast Guard should continue to encourage reciprocity between States on these craft and that the Coast Guard should be flexible in its requirements for numbering to insure maximum visibility of numbers on personal watercraft.
4. That the Coast Guard should amend their regulations to exclude TYPE IV PFDs for personal watercraft users and require operators and passengers to wear an approved PFD.
5. That the personal watercraft regulation and legislation be relegated to State and Local jurisdictions.
6. That the Coast guard's Consumer and Regulatory Affairs Branch and the Personal Watercraft Industry

Association serve as a clearinghouse for personal watercraft initiatives on the State and local level. The NBSAC Chairman should continue to communicate with the president of NASBLA and that youth age requirements should be a State function.

7. That the subcommittee be placed in an inactive status with the possibility of being reconvened at a later date.

Mr. Blackistone thanked Dick Bergen for his role as the Coast Guard representative and Roger Hagie from Kawasaki and the Personal Watercraft Industry Association and Nancy Linden from NHMA for their tremendous help.

MOTION: That the Council concurs with the foregoing recommendations as presented.

VOTE: In Favor – Unanimous.

The Subcommittee's complete report may be attained from the Council's Executive Secretary.

REPORT ON THE 1989 NATIONAL SAFE BOATING WEEK

Mr. Bill Ladd explained that National Safe Boating Week is when a year-round boating safety effort is kicked off. He said that this year's efforts have been focused on the small boats because about 54% of the boats in the U.S. are under 16 ft. in length. This year's subjects are limited to stability, alcohol, PFDs, weather, float plans and hypothermia. He believes that the only way to reach the boating public is by utilizing the general media and the dealers. He reported that over one million items were distributed in conjunction with this year's campaign. Mr.

Ladd concluded by urging the Council members to offer their suggestions for next year's program to Mr. Dick Bogue who is the incoming chairman.

BRIEFING ON BOATING SAFETY AT WALT DISNEY WORLD

Mr. Wayne Mitchell, Safety Department Director, Walt Disney World, briefed the Council on the history of his place of employment. He said that there are 27 miles of waterways and canals on the property consisting of 43 square miles or 27,000 acres. A part of Disney's plan was to create an aquatic wonderland where people could do just about anything water related and do it right. Mr. Mitchell reported that the Disney fleet is the fifth largest navy in the world in terms of number of craft. These craft run in size from small rental units to 600 passenger ferry boats. The majority of their fleet consists of small water sprites which are equipped with 9.9 HP outboard engines and are part of the rental fleet. He remarked that over 200 Disney trained pilots are employed to operate the transportation craft which carry from 45 to 600 passengers. He said that they are not bound by State or Federal boating regulations because they operate on private property. He added, however, what is a law for the rest of the world becomes a standard for their operation and non-compliance with a standard can be just as costly as violation of a law. There are 11 patrol boats with highly trained personnel utilized to keep watch over the rental fleet. The patrol officers are trained so as not to come down on operators heavy handedly, but to kill them with kindness. Mr. Mitchell explained that prop guards are used on the 9.9 HP outboard engines to help lessen the impact in the event of

a certain type of accident. Experiments using larger motors with prop guards showed that it was almost impossible to control direction of the craft. Additionally, he noted that when a prop guard equipped engine strikes anything at all, the entire lower unit usually breaks, resulting in a much higher cost than just replacing a propeller.

Chairman Garden asked how their safety record compares with the boating population at large.

Mr. Mitchell replied that they had operated for 18 years without a death, but unfortunately, two weeks ago they had one. A few things in his favor are: (1) Drinking and operating a craft is not permitted and (2) there are 11 patrol boats which are trained to remove an operator who may pose a danger.

The question was asked how many people rent and operate these small livery boats.

Mr. Mitchell replied that 365,000 people per year is a conservative estimate.

Mr. Vinton asked if the users of livery boats are required to wear PFDs.

Mr. Mitchell replied "Absolutely, as a matter of fact the PFDs for motorboats are equipped with a lanyard which is attached to the PFD and connected to the kill-cap which shuts off the engine if a person gets too far out of his seat". The patrol officers also check to make sure that PFDs are buckled.

The question was asked about the water depth of the lakes.

Mr. Mitchell replied that the deepest area is 60 feet and that the average would be about 20 ft.

COL Ellingsen asked about the minimum age for boat rental.

Mr. Mitchell replied that it is 12 years of age. He added that their problems are not really with the 12 to 16 year olds.

At this point the Council and guests were transported to Walt Disney World to witness first hand the actual briefing which is given to renters of motorboats. The rules are simple. No horseplay, and stay at least 50 feet from everything and anything. Failure to abide by the rules results in termination of the operator's boating career at Walt Disney World, a ride back to the dock on a patrol craft and no refund for unused rental time.

The group returned to the Las Palmas Inn at 1810.

Recess

TUESDAY 7 NOVEMBER 1989

0800 Chairman Garden called the meeting to order.

MEMBERS PRESENT

Same as preceeding day (except Ms. Ferrell)

MEMBER ABSENT

Ms. Ferrell

VIDEO – "Boating Safety" courtesy of WCVB-TV/BOSTON

REPORT OF THE COMMITTEE ON PROPELLER GUARDS

Captain James Getz, Subcommittee Chairman, explained that his committee was charged to review, among other things, available information and obtain as much information as possible on the issue of strikes by boat or propeller and subsequent or possible guarding or other related issues. He said that they provided the first objective opportunity for public review of what everyone knows is a very emotional and highly controversial subject. He stressed that the subcommittee was given only a charge and no specific recommendations or suggested conclusions by either the Council Chairman or the Coast Guard. He remarked that the final report received unanimous approval by the subcommittee members and there were no dissenting opinions or views. Captain Getz orally presented the following conclusions of the subcommittee to the Council.

1. Accident data and the analysis of accident data must be an integral component of a study of this nature. There is no one single source, best source, or all-inclusive source of accident data. However, the available sources can be utilized collectively to give an accurate portrayal of the significance, frequency, and relative magnitude of underwater impact to other causes of boating accidents in particular and accidents in general. There is no indication that any change in reporting would reflect significant changes in the relative position or percentage of injuries/fatalities due to underwater impacts. Therefore, propeller

guarding at best could have only a negligible impact on improving boating safety.

2. Injuries/fatalities, caused by underwater impacts, result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counterproductive and can create new hazards of equal or greater consequence.

3. Operator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities. Mandatory equipment requirements could be expected to have only a negligible impact on this problem. The most rational approach to the problem is to educate boaters, especially operators. They must be made to understand the abilities and limitations of their equipment. They must be aware of and understand the hazards their boat can cause to people in the water. Above all, they must be made to understand the consequences of careless or negligent operation of their watercraft, and how they, as boat operators, can act to prevent accidents.

4. Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into

thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Captain Getz informed the Council that his subcommittee's recommendations are:

1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

4. The U.S. Coast Guard should work with appropriate voluntary standards-making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat,

and maintaining the unobstructed fore and aft vision of the boat operator.

6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents and should provide all possible support to implement, maintain, and expand those programs targeting the prevention of accidents.

Captain Getz publicly thanked subcommittee members Richard H. Lincoln, William D. Selden and Herman T. Van Mell and Coast Guard representative Donald J. Kerlin for their extremely significant contributions to the project.

MOTION: that the Council accept the report, adopt the recommendations of the subcommittee, and discharge the subcommittee as having completed its task.

VOTE: In Favor – Unanimous

Mr. Lincoln commended Captain Getz for his performance as chairman of the subcommittee.

Chairman Garden told the Council that he had attended most of the subcommittee's meetings and had a very favorable impression of Captain Getz's leadership abilities.

Ms. Linda Barnby, a propeller strike accident victim, informed the Council that many more propeller strike accidents have occurred than have been reported to boating authorities. She feels that it is obvious that all related information is not in yet and that the search for new technology must continue in order to protect people and marine life.

A complete copy of the subcommittee's report may be obtained by contacting the Executive Secretary at the address or phone number listed on the first page.

Copies of all documents reviewed by the subcommittee may be obtained by contacting the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Ms. Judith Vallee, Save the Manatee representative, informed the Council on the problem of injury or death of manatees as a result of contact with boats and/or motors in Florida waters. She concurred with Ms. Barnby's recommendation for continued research on propeller guards.

Chairman Garden assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened.

REPORT ON THE 1990 NATIONAL SAFE BOATING WEEK

Mr. Dick Bogue, chairman of the 1990 NSBW, told the Council that he wants to be sure that every Council member receives a copy of the 1990 National Safe Boating Week action kit, which is comprised of posters and everything else that is required to run a campaign. He likened a boating safety campaign to a political campaign with each area having different priorities and problems. The Action manual will be arranged in such a manner so as to show a person how to organize, deal with the media and be either for or against an issue. A distribution center has been set up to send out between 250,000 to 300,000 kits when they are complete. He also told about contacting

marine catalog publishers about illegible boating safety messages in their publications. All of them agreed to do so if they are furnished camera ready script. He has some people who are putting together a program to give to public libraries so they can promote the cause. He also asked Phil Keeter to look into the possibility of getting food stores to put boating safety messages on the back of cash register receipts. His goal is to get everyone interested in promoting boating safety to be on the same bandwagon and either vote for boating safety or against death and destruction. He concluded by soliciting help and suggestions from everyone.

Mr. Anderson reminded the Council that this project is being billed as the National Safe Boating Campaign, 1990 so that people get the message that this is a 52-week-a-year campaign and that National Safe Boating Week is just to kick it off.

PRESENTATION ON PONTOON BOATS

Mr. Kerlin briefed the Council on the status of pontoon boats. He said that the only Federal Requirement that affects these craft is the Hull Identification Number (HIN) requirement. The regulations dealing with capacity, flotation, horsepower, etc. only apply to mono-hulled boats. However, as the result of comments that former Council member Bolling Douglas made some time ago, the issue was looked into. He informed the Council that the American Boat & Yacht Council (ABYC) has developed voluntary standards H-35, entitled Powering and Loading Capacities of Pontoon Boats. These will be published within the next three months. He said that these

particular standards are intended to prevent these craft from corkscrewing, submarining and capsizing from too many people going up forward on the deck at one time. This voluntary standard also addresses factory supplied accessories and options installed after the original unit is checked for weight carrying capacity as well as the subject of self-draining decks. For stability purposes the rails must be a minimum of 48 inches aft of the tip of the pontoon and the distance between the fore and aft rails is eight-tenths of the overall length.

Chairman Garden asked if the Coast Guard has the authority to create a mandatory standard.

Mr. Kerlin replied "Yes, however the existing regulations would have to be changed because they specifically refer to mono-hulled boats".

Mr. Game told the Council that this is a good example of the government working with the private sector to develop voluntary standards.

Mr. Kerlin said that this voluntary standard will be incorporated into next year's certification program by NMMA.

UPDATE ON 1990 NATIONAL BOATING EDUCATIONAL SEMINAR

Mr. Bob Green, chairman of the upcoming seminar, explained that the sponsor of the event is the National Safe Boating Council, a group of over 70 organizations that are involved in boating safety. The seminar will be held in Orlando, Florida from March 3rd to the 7th, 1990 at the Holiday Inn on International Drive. He reported that the organization would be meeting later in the day to

finalize the agenda. He said that the seminar is open to anyone who is involved in boating safety. These will be several exciting on-the-water demonstrations, a presentation on the U.S. Power Squadrons video boating course and numerous highly qualified speakers.

BREAK

PRESENTATION ON LIGHTHOUSE AUTOMATION

LT John Brooks, Aids to Navigation Branch, Coast Guard Headquarters, told the Council that this is the 200th anniversary of lighthouse service as a Federal government function. The first Federally constructed lighthouse was old Cape Henry Light which was used to mark the entrance to the Chesapeake Bay. It is now a historic landmark. He said that there are 450 active U. S. Coast Guard-maintained lighthouses around the country and all except four are automated. Automation has occurred for three primary reasons. They are: (1) efficiency, (2) economy and (3) the invention of the fog detector. The Lighthouse Automation and Modernization Program (LAMP), a 20-year program initiated in 1968 and extended 1 year, will officially wind up this year. As of next summer, Boston Light will be the only manned light remaining in the country. Explaining the various categories of lights, LT Brooks said that Category 1 lights are AC powered, either by direct shore power connections or a generator. They also have monitors, remote control capability and a DC power backup. He said that the less important Category 3 lights do not usually have automatic power system back-up or remote control capability. He told the Council that some lights are solar powered. He added that $27

million was authorized for the LAMP program 21 years ago. Ten years into the program the costs became negative and now it is estimated that it saves the government about $7 million per year. He concluded by telling the Council that President Bush had proclaimed August 7, 1989 as National Lighthouse Day to commemorate the bicentennial of the service and that the Postal Service will issue a series of five special lighthouse stamps next year.

Chairman Garden stated that there seems to be community oriented opposition to the automation of lighthouses. He asked what is being done to avert this feeling.

LT Brooks replied that the various communities must be informed that it is not economically feasible to man all lighthouses. He also said that the media must be educated to the fact that just because a lighthouse is no longer manned it is not an indication that it is no longer needed.

Chairman Garden relayed to the Council that back in the early 50's he was on the staff of the Coast Guard District Commander in New York when Headquarters ordered a reduction in expenses for Aids to Navigation. On the list for possible reduction was the disposal of Jeffery's Hook Light on the Hudson River beneath the George Washington Bridge. An unsuccessful attempt had been made to donate the light to the New York City Department of Parks. Bids were then requested to dismantle the light by private concerns. The single bidder requested $20,000 to tear down the light which was not acceptable. Mr. Garden relayed how his energetic Chief Journalist did research at the public library and found a children's storybook entitled *The Little Red Lighthouse and the Great Grey Bridge*.

This book was used to publicize their predicament in *Life* and *Time* magazines and several local publications. As a result of the publicity, the City of New York's Parks Department accepted responsibility for the ownership and upkeep of the structure. Incidentally, the Chief Journalist's name was Alex Haley.

"PASSENGERS FOR CONSIDERATION" SUBCOMMITTEE RECOMMENDATIONS UPDATE

LT Randell Sharpe, Merchant Vessel Inspection Division (G-MVI), Office of Marine Safety, Security and Environmental Protection, Coast Guard Headquarters, informed the Council that various elements of his Office had reviewed the subcommittee's recommendations and in turn have advised against going forth with them at this time. He said that the definition of "Passenger" must remain unchanged so as to allow the Coast Guard to enforce, in a broad nature, the safety regulations for passenger carrying vessels. He remarked that there are five different definitions of "Passenger" in the law and that none of them match. He reported that his office is attempting to produce a legislative proposal that would result in changing the law so that there will be only one uniform definition of "Passenger". He told the Council that once some progress is made on this proposal, comments will be welcome even though it is not a proposed rulemaking.

Mr. Van Mell, Subcommittee Chairman, said that his committee realized that this is a complex problem and should have legislation enacted to correct it. He added that

sooner or later some insurance company will void a recreational boater's policy because he was technically carrying passengers for consideration. He also requested that any legislative proposal should be reviewed by the Council.

Mr. Simon informed the Council that the real problem is insurance coverage.

Mr. Game recommended that the subcommittee be reactivated.

Chairman Garden suggested that as progress is made on this there should be participation by the Council.

LT Sharpe replied that he sees no problem with that as long as the Council, charter boat organizations, and the party vessel owners can agree on a middle ground.

Mr. Donheffner asked if there is a draft definition.

LT Sharpe replied "Not at the present time".

SUBJECTS OF GENERAL INTEREST

CAPT Griswold briefed the Council on the following activities of various Divisions in the Office of Navigation.

NATIONAL SEARCH AND RESCUE SCHOOL

The Executive Director informed the Council that this school had recently been moved from Governor's Island, New York to Yorktown, Virginia.

COMPUTER CENTER

CAPT Griswold told the Council that plans are being made to move the Coast Guard's computer center to a new location in Martinsburg, West Virginia.

RADIONAVIGATION PROGRAM

CAPT Griswold gave a brief update on the Radionavigation Program. He said that the LORAN system will soon be in service completely across the country. A LORAN chain is being developed in the Aleutian Islands through a cooperative agreement with the Soviet Union. He also spoke about the OMEGA System and the Global Positioning System (GPS). He expects GPS equipment to become affordable for recreational boaters in the near future. The Captain mentioned that the Coast Guard is working on turning over several LORAN stations to their host countries

Mr. Brightbill asked about the timetable for completion of the mid-continent LORAN.

CAPT Griswold replied that it should be in the near future.

The Captain told the Council that the 406 MHz Emergency Position Indicator Radio Beacons (EPIRBs) are coming into being on schedule. This new unit is a big improvement over the earlier models.

Captain Griswold concluded by informing the Council on the Coast Guard's replacement program for the 44 ft. motor lifeboat.

Mr. Game asked about the statistics quoted on the earlier boating safety news film.

Chairman Garden replied that it was a local TV program from Boston and they were quoting Massachusetts statistics which are running ahead of average this year.

Mr. Game remarked that high-visibility PFDs should be required to be worn by all persons engaged in high-risk water activities like water skiing or personal watercraft use.

Chairman Garden reported that Mr. Bogue will mail a copy of the new UL PFD standards to each Council member.

RESPONSE TO MEMBERS' ITEMS

THRILLCRAFT EXEMPTIONS

In response to Chairman Garden's concern about the new outboard powered version of thrillcraft and the exemptions that have been issued to previous models, Mr. Kerlin told the Council that thrillcraft can not be rated for weight carrying or horsepower capacity because of their unusual design. He said that he takes exception to the industry's definition of a personal watercraft as being jet powered and less than 16 feet in length. The bottom line is that they are regulated by the Coast Guard. He added that there are no available statistics to prove additional danger of prop strike on personal watercraft/thrillcraft (PWC/TC). There are 43 manufacturers of this type craft on file. In response to the concern about how many units are in use, Mr. Kerlin replied that he does not have a reliable estimate.

CHANGING HIN's

Mr. Kerlin, responded to Mr. Brightbill's concern about manufacturers changing the left over boat's HIN in order to sell the unit as a new, current year item, by saying that basically after a boat hull leaves the place of manufacture, the manufacturer must first get Coast Guard authorization before a HIN may be legally changed. The changing of the model year on a boat is a manufacturing and moral concern.

Mr. Ladd informed the Council that many States will confiscate a boat that has an altered HIN.

COL Ellingsen informed the Council that it sounds like consumer fraud when a model year is updated.

Mr. Game added that he feels that the practice should be stopped.

Mr. Kerlin repeated that as long as a boat remains at its place of manufacture the builder can do anything that he feels like doing. Coast Guard permission is necessary to alter a HIN after the boat leaves the factory. He added that to date only two petitions for change of HINs have been received by the Coast Guard.

Mr. Brightbill said he was shocked by the number of boats he saw at the Chicago Trade Show that had obviously altered HINs. He asked what the penalty is for failure to get permission to alter a HIN.

Mr. Kerlin replied, "$1,000.00 per boat".

Chairman Garden told the Council that two new subcommittees will be formed and one of them will be addressing this issue in depth.

EXPAND H.P. REGULATIONS TO BOATS OVER 20 FEET IN LENGTH

Mr. Kerlin responded to Colonel Ellingsen's desire to have the horsepower regulations expanded so as to include boats that are 20 ft. or more in length by telling the Council that at present the Coast guard has no data or statistics available to justify expansion of these regulations. If justification becomes available, a change will be considered.

STATE FUNDING GRANTS

In response to Captain Getz's concerns that the States will not receive their full share of funding, Captain Griswold informed the Council that Mr. George Stewart and Mr. Tom Atkinson, the president of NASBLA had met with the Vice Commandant and Commandant and were assured that they have the Coast Guard's support on this.

RAIDS ON TRUST FUNDS

Responding to Mr. Haseltine's concern about a possible raid on boating trust funds, Captain Griswold said that he is not aware on [sic] any impending raid but he will keep on the alert.

COMPREHENSIVE PLAN FOR BOATING EDUCATION

Captain Griswold told the Council that his first priority is to try to hire two additional people to work for Mr. Hunt Anderson. Chief Education Branch. The Captain said that when additional help is received a long-range plan will be developed. At present Mr. Anderson is developing a

plan that can be used by various organizations to create a specific function-oriented education program.

Mr. Lincoln remarked that he was greatly encouraged by Mr. Anderson's presentation the preceding day. He also urged Mr. Anderson to contact Mr. Bill Eck, Chairman, NMMA's Permanent Committee on Education, for assistance as well as to exchange information.

SUBCOMMITTEE FUNDING

Captain Griswold explained that the Department of Transportation has a ceiling on what is allowed to be spent by advisory committees. He said that two new Coast Guard advisory committees were established this past year without additional funding and that put additional constraints on existing committees. The Executive Director pledged ongoing support to the Council and its subcommittees.

NAME CHANGE FOR RORAC

CDR Meyers, responding to Mr. MacNeills's concerns, briefed the Council on the history of RORAC and said that the name change and expansion of responsibilities will probably take place in the near future when the Coast Guard's Authorization Bill is enacted. The new responsibilities will include Inland & International Rules of the Road, navigation regulations and equipment, Aids to Navigation systems, routing measures, marine information and diving safety. The new Council will be named the Navigation Safety Advisory Council and will be required to meet at least two times per calendar year.

STANDARDIZED PUMP OUT CONNECTIONS

Mr. Bergen responded to Mr. Simon's concern, that pump out facilities use various size connections for pumping a boat's holding tank, by informing the Council that the Coast Guard does not have the regulatory authority to deal with pump-out fittings or holding tanks or the shore pump-out station's connections. However the ABYC has some voluntary standards on holding tanks which have a blank page where the standard connection size should be.

Mr. Simon replied that he wants to get the blank page filled in to create a universally standard size for connections.

STANDARDIZED COLOR & SIZE FOR SPEED ZONE BUOYS

Captain Griswold replied to Mr. Simon's desire to have a standard size and color for speed zone buoys by saying that color and design for control buoys is already addressed by the Uniform State Waterways Marking System.

INCREASED BOATER EDUCATION ON HURRICANES

Captain Griswold responded to Mr. Tulla's suggestion to increase boater education concerning hurricane survival by telling the Council that several publications, such as Chapman's, have sections explaining how a boater can protect himself against hurricanes. There are also several pamphlets on the subject that could use wider distribution in preparation of the storm season.

MARPOL REGULATIONS

Mr. Bergen replied to Mr. Game's concern about the intent of the new garbage regulations by stating that a new Boating Safety Circular, which explains the proposed regulations, will be distributed to over 15,000 recipients in the near future.

EDUCATION SUBCOMMITTEE REPORT UPDATE

Captain Griswold responded to Mr. van Orman's concern about action taken as a result of the subcommittee's final report by telling the Council that some restraints have prevented rapid expansion of the education program. However, a good number of the financial grants for non-profit organizations were education oriented. He intends to monitor the State programs that have mandatory education and at some future time compare them with the programs of States that have no such requirement.

Mr. Selden told the Council that he feels the Coast Guard's main thrust should be to promote existing volunteer organizations that teach and encourage safe boating. This can be accomplished by mentioning these organizations in TV spots and other promotions.

Captain Griswold responded that all organizations are actively promoted as well as the 800 Boating Course telephone number (1-800-336-BOAT. In VA 800-245-BOAT).

HALON FIRE EXTINGUISHERS

Mr. Sciulla remarked that he understands that a bill has been submitted to prohibit Halon Fire Extinguishers.

Captain Griswold replied that he is aware of a Federal group that is looking for an alternative to Halon by 1991.

COAST GUARD PUBLIC SERVICE COMMENDATIONS

Captain Griswold and Chairman Garden presented the Coast Guard Public Service Commendation to Messers Bishop, Blackistone, Lincoln, Van Mell and van Orman, Captain Getz and Mrs. Toups.

Mr. Bishop remarked that he thoroughly enjoyed his membership on the Council which is comprised of a dedicated group of professionals.

Mr. Blackistone echoed Mr. Bishop's comments and said he hopes that we continue as a universal group to solve the problems that are out there.

Captain Getz said that he was honored to be one of seven State representatives serving on the Council. Additionally he felt very honored to serve with all of the other members and especially Chairman Garden, who responded that the "Class of 89" will be missed.

Mr. Lincoln remarked that the Council is a fantastic organization and he feels the Congress is lucky that the Council is working out so well. He also said that the Coast Guard is extremely fortunate to have the quality of people selected for membership on the Council

Mrs. Toups said that she felt very comfortable working with the people on the Council and thought that the three-segment makeup of the Council was an excellent idea.

Mr. Van Mell related that service on the Council has been a very enjoyable and rewarding experience and was grateful for the opportunity to serve.

Mr. van Orman remarked that public service carries its own special brand of reward and it's certainly not monetary. His service has been enjoyable and educational. He was thoroughly impressed with the capable leadership provided by the chairman.

CHAIRMAN'S SESSION

Chairman Garden informed the Council that he was directed at the last meeting to contact the Chairman of NASBLA and advise him of the recommendation that it was not appropriate or within the Coast Guard's responsibility to suggest that liability insurance be required for personal watercraft operators because it is clearly not a Federal issue but something that the States might choose to look at. He did write to Mr. Tom Atkinson, NASBLA President.

Chairman Garden reported that he had received a nice note from Barbara Lippmann in response to his letter of condolence after Jim's death.

Chairman Garden, on a brighter note, congratulated Mr. Lysle Gray on his appointment to the position of Executive Director of ABYC.

NEW SUBCOMMITTEES

Chairman Garden appointed members to serve on two new committees. They are:

The Coast Guard Consumer Relations Review Subcommittee consisting of Mr. Simon as chairman, Messrs. van Orman, Donheffner, Vinton, Game, and MacNeill as members and Mr. Bergen as the Coast Guard representative.

The Recreational Boating Standards Review Subcommittee consisting of Mr. Haseltine as chairman, Ms. Ferrell and Messrs. Van Mell, Scott, Brightbill, and Montgomery as members and Mr. Kerlin as the Coast Guard representative.

Specific charters and charges will be drawn up for each subcommittee in the near future.

Chairman Garden announced that the National Safe Boating Council will meet beginning at 2:00 pm in the same room. He mentioned that Jim Ellis will be the incoming chairman of that organization.

Chairman Garden thanked Wayne Mitchell for his very educational part in the program and his hospitality at Walt Disney World. Additionally, he thanked Admiral Nelson and Captain Griswold for their hospitality at the wine and cheese reception the previous evening. He closed by reminding everyone that the next meeting will be in May, 1990 in Denver, Colorado.

Meeting adjourned at 1216.

This is to certify that the above are the accurate minutes of the forty-fourth meeting of the National Boating Safety Advisory Council.

/s/ A. Newell Garden

A. Newell Garden, Chairman
National Boating Safety
Advisory Council

Enclosures: (1) Summary of State BAC Laws
(2) List of guests

SUMMARY OF STATE "OUI" BOATING LAWS

September 1989

	BLOOD ALCOHOL CONCENTRATION STANDARD	BEHAVIORAL STANDARD	FIELD TEST METHODS DEFINED	IMPLIED CONSENT LAW	MAXIMUM PENALTIES FIRST OFFENSE	SUSPEND OPERATOR PRIVILEGE
ALABAMA	–	NO	NO	NO	$ 500/6 MOS.	YES
ALASKA	.10	NO	NO	NO	$ 500/6 MOS.	NO
ARIZONA	.10	NO	YES	YES	$1000/6 MOS.	NO
ARKANSAS	–	YES	NO	NO	$ 500/6 MOS.	NO
CALIFORNIA	.10	NO	YES	NO	$1000/6 MOS.	NO
COLORADO	.10	YES	YES	YES	$1000/6 MOS.	YES
CONNECTICUT	.10	NO	NO	NO	$1000/1 YR.	YES
DELAWARE	–	NO	NO	NO	$ 500/10 DAYS	YES
FLORIDA	.10	YES	YES	YES	$ 500/6 MOS.	YES
GEORGIA	.10/.12	YES	YES	YES	$1000/1 YR.	NO
HAWAII	–	NO	NO	NO	$1000/1 YR.	YES
IDAHO	.10	NO	NO	NO	$ 300/30 DAYS	YES
ILLINOIS	.10	YES	YES	YES	$1000/1 YR.	YES
INDIANA	.10	YES	YES	YES	$ 500/6 MOS.	YES
IOWA	–	YES	YES	NO	$1000/1 YR.	NO
KANSAS	.10	NO	YES	NO	$ 500/1 YR.	NO
KENTUCKY	–	NO	NO	NO	$ 100	NO
LOUISIANA	.10	NO	YES	YES	$ 500/6 MOS.	YES
MAINE	.08	YES	YES	YES	$ 500/6 MOS.	NO
MARYLAND	.07/.10	NO	YES	NO	$ 500	NO
MASSACHUSETTS	–	NO	NO	NO	$ 500/6 MOS.	NO
MICHIGAN	.10	YES	NO	NO	$ 500/90 DAYS	YES
MINNESOTA	.10	YES	YES	YES	$ 700/90 DAYS	YES
MISSISSIPPI	–	NO	NO	NO	$ 250/30 DAYS	NO
MISSOURI	–	NO	NO	NO	$ 500/6 MOS.	NO
MONTANA	.10	NO	YES	YES	$ 500/6 MOS.	NO
NEBRASKA	.10	NO	YES	YES	$1000/6 MOS.	NO
NEVADA	.10	NO	YES	YES	$1000/6 MOS.	NO
NEW HAMPSHIRE	.10	NO	YES	YES	$1000/1 YR.	YES
NEW JERSEY	.10	NO	NO	YES	$1000/6 MOS.	YES
NEW MEXICO	–	NO	NO	NO	$ 500/30 DAYS	NO

NEW YORK	.10	NO	YES	NO	$ 350	NO
NORTH CAROLINA	.10	NO	NO	NO	$ 500/6 MOS.	NO
NORTH DAKOTA	–	NO	NO	NO	$ 500/30 DAYS	NO
OHIO	.10	YES	YES	YES	$1000/1 YR.	YES
OKLAHOMA	–	NO	NO	NO	$1000/6 MOS.	NO
OREGON	–	YES	NO	NO	$2500/1 YR.	NO
PENNSYLVANIA	.10	NO	YES	YES	$2500/90 DAYS	YES
RHODE ISLAND	–	NO	NO	NO	$ 500/6 MOS.	NO
SOUTH CAROLINA	–	NO	NO	NO	$ 200/30 DAYS	YES
SOUTH DAKOTA	–	NO	NO	NO	$1000/1 YR.	NO
TENNESSEE	.10	NO	NO	YES	$1000/12 MOS.	YES
TEXAS	.10	YES	NO	YES	$1000/6 MOS.	NO
UTAH	.08	NO	YES	YES	$1000/6 MOS.	YES
VERMONT	.10	YES	NO	NO	$ 300/3 MOS.	YES
VIRGINIA	.10	NO	NO	YES	$1000/1 YR.	YES
WASHINGTON	.10	NO	NO	NO	$1000/90 DAYS	NO
WEST VIRGINIA	–	NO	NO	NO	$ 300/90 DAYS	NO
WISCONSIN	.10	NO	YES	YES	$200	NO
WYOMING	.10	NO	NO	NO	$ 750/6 MOS.	YES
AMERICAN SAMOA	–	NO	NO	NO	$1000/1 YR.	YES
DC	–	NO	NO	NO	$ 300/10 DAYS	NO
CNMI	–	NO	NO	NO	$1000/1 YR.	YES
GUAM	–	NO	NO	NO	$1000/1 YR.	YES
PUERTO RICO	.10	NO	NO	NO	$ 500/2 MOS.	NO
VIRGIN ISLANDS	.10	NO	YES	YES	$1000/1 YR.	NO

NOTES:

1. Unlawful in all States to operate a vessel under the influence (OUI) of alcohol or drugs.
2. *Blood Alcohol Concentration (BAC).* Where the column shows two figures, this indicates the State has established progressively stiffer penalties for different levels of intoxication.
3. *Implied Consent Law* means the refusal of a boater to submit to a test for intoxication (e.g. breathalyzer, blood test, etc.) may be introduced in court as evidence of intoxication, and in some States, it may be considered as a separate offense.
4. *Field Test Methods Defined* means that the general method of determining blood alcohol concentration, or other standard of intoxication illegible the law or regulation.

Guests at 44th NBSAC meeting

Name	Association	address	phone no.
Jay E. Brown	National Boating Federation	3217 Fiji Lane Alameda, CA 94501	415-523-2098
Mike Sciulla	BOAT/US	880 S. Pickett St. Alexandria, VA 22304	703-828-9550
Jim Ellis	BOAT/US	880 S. Pickett St. Alexandria, VA 22304	703-823-9550
Mary M. Mann	NMMA	1000 Thomas Jefferson St. Washington, DC 20007	202-338-6662
Phil Keeter	MRAA	155 N. Michigan Ave. Chicago, IL 60601	312-938-0359
Aime Bernard	USCGAUX	400-SC Orlando Ave. Ocoee, FL 34761	407-656-9828
Bob Malone	National Safe Boating Council	1679 A S. Hay St. Arlington, VA 22202	703-521-2997
Ron Stone	NMMA	Washington, DC	202-338-6662
Bill Ladd	Outdoor Empire	511 Eastlake Ave. Seattle, WA 98109	206-624-3845
Gilles R. Gareau	CDN Coast Guard	Canada Bldg (AMSFC) 344 Slater St. Ottawa ONT KIAON7	613-991-3129
John Dane	NMMA	1000 Thomas Jefferson St. Wash., DC 20007	202-338-6662
Lysle B. Gray	ABYC	Box 747 Millersville, MD 21108	301-744-4850
Dick Bogue	U.L.	12 Laboratory Drive Research Triangle Park, NC 27709	919-549-1565
John Hannon	USCG (G-MVI)	Washington, DC.	202-267-1464

Robert Green	USPS NSBC	59 Webb Ave. Ocean Grove, NJ 07756	201-776-6020
David Gaul	USCG	25 Walkers Ridge Dr. Ponte Vedre Bch., FL 32032	904-285-9849
Greg Schafer	USCG (MSO)	155 Columbia Pr. Tampa, FL	813-709-2736
Susan Blake	American Red Cross	17th & D St, NW Wash., DC 20006	202-639-3106
Chris Jackson	WESH-TV	Winter Park, FL	407-645-2222
Sandra Custer	Guest	Jensen Beach, FL	407-334-8982
Judith Vallee	Save the Manatee	Orlando, FL	407-539-0990
Linda Barnby	Guest	Winter Park, FL	407-647-7871
Dennis Carroll	NOAA	Rockville, MD	301-443-8157
Margot J. Brown	NBF	3217 Fiji Lane Alameda, CA 94501	415-425-2098

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached (~~is a true copy~~)
(are true copies)
of the original Minutes of the 44th Meeting of the National Boating Safety Advisory Council; Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council; and Rear Admiral Robert T. Nelson letter to Mr. A. Newell Garden of February 1, 1990.

on file in the Auxiliary, Boating, And Consumer Affairs Division

Signed and dated at Washington, DC

this 2nd day of April , 1992

/s/ Albert J. Marmo

By Albert J. Marmo

Assistant Chief, Auxiliary, Boating,
And Consumer Affairs Division
(Title)

I HEREBY CERTIFY that Albert J. Marmo

who signed the foregoing certificate is now, and was, at the time of signing Assistant Chief, Auxiliary, Boating, And Consumer Affairs Division.

and that full faith and credit should be given his certificate as such.

[SEAL]

IN WITNESS WHEREOF I have hereunto subscribed my name and caused the seal of the Department of Transportation to be affixed this 2ND day of APRIL , 1992

at WASHINGTON, D.C.

/s/ William B. Thomas

WILLIAM B. THOMAS
(Signature)

CHIEF, CLAIMS AND LITIGATION DIVISION UNITED STATES COAST GUARD HEADQUARTERS
(Title)

WASHINGTON, D.C. 20593-0001
Department of Transportation

EXHIBIT 7

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U. S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of college students to gather hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our National Non-profit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position: Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U. S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/ Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

/s/ Robert T. Nelson
ROBERT T. NELSON
Rear Admiral, U. S. Coast Guard
Chief, Office of Navigation Safety and Waterway Services

EXHIBIT 8

**Motorboat
Propeller
Injuries**

Jon S. Vernick and Associates

**The Johns Hopkins University
Injury Prevention Center**

**Institute for
Injury Reduction**

(SEAL)

**Motorboat
Propeller
Injuries**

Jon S. Vernick and Associates

**The Johns Hopkins University
Injury Prevention Center
and the
Institute for Injury Reduction**

AUTHORS

Susan P. Baker
Lavinia Edmunds
Benjamin Kelley
Lynne Smith
Stephen P. Teret
Jon S. Vernick
Amy Zierler

The authors gratefully acknowledge the valuable advice and assistance of Laura Higgins at The Johns Hopkins Injury Prevention Center and Cindy Raffles at the Institute for Injury Reduction.

This work was supported in part by grant R49CCR302484-05 from the Division of Injury Control, Center for Environmental Health and Injury Control, Centers for Disease Control, Atlanta, GA.

Executive Summary

The purpose of this report is to collect and summarize existing studies of the incidence and severity of motorboat propeller injuries, of the feasibility of propeller injury countermeasures, and of the effectiveness of

manufacturer, regulatory and litigation efforts to reduce these injuries.

Injuries caused by motorboat propellers have been documented in medical literature worldwide for more than 20 years. These injuries are often characterized by massive trauma, including significant blood loss, amputation or death.

In the United States, the Coast Guard has jurisdiction over recreational boating, including the authority to promulgate rules for marine safety equipment and the responsibility for gathering and reporting data on recreational boating injuries. Between 1976 and 1990, the Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its *Boating Statistics* category "struck by boat or propeller," or an average of approximately 100 per year. For a number of reasons, primarily the non-reporting of many propeller injuries to the Coast Guard, these data represent substantial and systematic underreporting. Other estimates of the annual incidence of non-fatal propeller injuries have been much higher: 2,013 in a 1991 Red Cross boating survey and 3,420 in an unpublished 1979 Coast Guard study.

Since most recreational power boats remain propeller-driven, efforts to prevent propeller injuries have concentrated on the design and manufacture of propeller guards – devices in the shape of rings or cages which surround the propeller and separate its spinning blades from people in the water. Propeller guards designed to protect people and marine mammals have been developed and patented by private entrepreneurs for more than 35 years.

No major marine engine manufacturer currently offers for sale any propeller guard intended to protect people in the water. Possible reasons for this position are explored.

Primarily in the context of litigation on behalf of people injured by unguarded boat propellers, a number of analyses of the hydrodynamic feasibility and protective effect of various propeller guards have been conducted. Although there is little consensus as to the hydrodynamic feasibility of guards, several engineering studies suggest that a cage-type guard would prevent most serious limb injuries at speeds at least up to about 10-12 mph. Additional well-designed and unbiased research is needed.

In 1988, a subcommittee of the Coast Guard's National Boating Safety Advisory Council was appointed to examine the issue of propeller injuries and to recommend appropriate regulatory action concerning propeller guards. Relying in part upon the Coast Guard's incomplete data set, in 1989 the subcommittee recommended that no regulatory action be taken to require propeller guards. The Coast Guard accepted the subcommittee's recommendation and no regulations were promulgated.

Given the Coast Guard's refusal to mandate guards and the manufacturers' unwillingness to introduce them voluntarily, the primary remaining propeller injury forum has become tort litigation. A series of cases is discussed, reviewing arguments for and against manufacturer liability, including the legal reasoning and potential societal effect of preempting plaintiffs' case.

Finally, misconceptions about propeller injuries and their prevention are critically examined. Recommendations are made to improve propeller injury data collection

and to encourage the development of feasible countermeasures to reduce the toll of these devastating injuries.

Contents

[Counsels' note: bracketed references are to Joint Appendix pages]

Part One

CLINICAL ASPECTS AND EPIDEMIOLOGY OF PROPELLER INJURIES ..... 1 [174]

Introduction ..... 1 [174]

Clinical Aspects ..... 2 [178]

Epidemiology ..... 3 [180]

Underreporting ..... 8 [190]

Conclusion ..... 12 [199]

Part Two

PREVENTING PROPELLER INJURIES: FEASIBILITY OF COUNTERMEASURES ..... 13 [199]

Introduction ..... 13 [199]

Automatic Protection ..... 13 [201]

Eliminating Propellers: Water Jet Propulsion ..... 14 [202]

Separating Propeller Blades From People: Propeller Guards ..... 15 [204]

Propeller Guard Patents and Private Entrepreneurs ..... 15 [205]

Hydrodynamic Tests and Analyses of Propeller Guards ..... 17 [209]

Robert Taggart Report ..... 17 [209]

Outboard Marine Corporation Tests ..... 18 [211]

Mercury Marine Tests ..... 19 [213]

Chadwell Propeller Guard Tests ..... 20 [215]

Propeller Guard Protective Effect Testing ..... 21 [218]

Richard Snyder "Sausage Tests" ..... 21 [219]

Lawrence Thibault Head Impact Tests ..... 22 [220]

Ben Hogan Diver Tests ..... 22 [221]

University of Tennessee Cadaver Tests ..... 23 [222]

Conclusion ..... 24 [224]

Part Three

PROPELLER INJURY POLICIES, LEGISLATION AND LITIGATION ..... 25 [225]

Introduction ..... 25 [225]

United States Coast Guard ..... 25 [226]

Manufacturers ..... 30 [236]

Litigation ..... 31 [239]

Fitzpatrick v. OMC ..... 31 [240]

Elliott v. Mercury Marine ..... 32 [241]

Preemption Cases ..... 35 [247]

State Action ..... 38 [254]

Conclusion ..... 39 [257]

Part Four

PROPELLER INJURY MISCONCEPTIONS ..... 41 [258]

Part Five

RECOMMENDATIONS ..... 45 [263]

PART ONE

Clinical Aspects and Epidemiology of Propeller Injuries

Introduction

On September 4, 1989, Linda Katherine Hall[1], six months pregnant, was riding in a 16-foot fishing boat on Lake Tohopekaliga in Florida, when her sun visor blew off. While trying to retrieve it, she fell overboard and under the boat. The boat's propeller struck her in the head and sheared off a piece of her skull four inches in diameter. Her baby, delivered by Caesarean section at one pound ten ounces, survived 16 hours. Six days later, Ms. Hall died, one of a growing number of victims of motorboat propeller injuries. [Lebowitz, 1989]

Boating-related injuries occur to operators, passengers, and others in the water, most often in the course of recreation – skiing, boating or swimming – during the crowded summer boating season. [Red Cross, 1991; USCG *Boating Statistics*, 1990]. In recent years, as the result of more than a dozen lawsuits, attention has been focused on motorboat propellers as instruments of devastation that are injuring and killing large numbers of people. [Hogan, 1989; Bolden, 1987]

The motorboat propeller can be deadly. Spinning three to five times faster than the forward speed of the boat [Reed, 1987], its blades are hidden under water, invisible to most victims. Among those struck in the head, few survive. When struck in the extremities, victims often face amputations and severe disfigurement.

---

[1] Not her real name.

[Thibault, 1987; Gomez, 1991] These injuries have been described as "devastating," "catastrophic," and "the civilian equivalent of severe battlefield injuries." [Banta, 1979; Mann, 1976, Romano, 1962] Like the hazard which causes them, however, propeller injuries are a hidden category of recreational injuries.

For at least two decades, propeller injuries have been documented in the medical literature as a dramatic but largely preventable class of injury. [Jackson, 1965; Paterson, 1971; Sleight, 1974] Monitoring the true number of propeller injuries, however, has been difficult, since they are substantially and systematically underreported in data published by the United States Coast Guard, the federal agency responsible for boating safety in the United States. In fact, many who have fallen overboard, like Linda Katherine Hall have been included only in the Coast Guard's "fall overboard" category, even though their deaths or injuries were a direct result of a blow from the propeller.

The Coast Guard has a difficult task in policing the nation's crowded recreational waterways with admittedly limited resources. Failure to report known boating injuries in a manner that would illuminate rather than obscure the role of motorboat propellers, however, results in little if any cost or manpower savings. More importantly, the Coast Guard's current data collection and reporting methods preclude sound government decision-making toward the prevention of propeller injuries.

In addition, marine propulsion manufacturers, whose products cause these injuries, have failed to step into the void created by inadequate Coast Guard data. They have

not initiated active injury surveillance efforts to determine the true incidence of propeller injuries. Although the number of known cases should have been more than sufficient to stimulate preventive action, manufacturers have not committed appropriate energy or resources to developing ways to reduce or eliminate these deaths and injuries.

TABLE 1.

Struck by Boat or Propeller

Injury and Fatality Totals
U.S. Coast Guard Boating Statistics Data, 1976 – 1990

Year	Fatalities	Injuries	Total
1976	12	112	124
1977	5	107	112
1978	16	95	111
1979	18	69	87
1980	12	88	100
1981	7	83	90
1982	11	66	77
1983	18	113	131
1984	8	79	87
1985	16	98	114
1986	16	133	149
1987	12	155	127
1988	11	40	51
1989	6	60	66
1990	7	180	187
TOTAL	175	1,438	1,613

Clinical Aspects

Surgeons attending patients with propeller injuries report especially severe and disabling wounds. Inertial force, drag and the added mass of the boat affect the dynamics of objects colliding in water so that the force of a collision in water is greater than that of an equivalent collision in air. [Purcell, 1987] The spinning propeller blades strike the human body with the force of both the forward velocity of the boat hull and with their own even greater rotational velocity. After the body is struck by the propeller, the relative viscosity of water can limit the body's deflection, making it more likely to absorb the full energy of the impact. [Hargarten, 1992]

Propeller injuries frequently involve multiple wounds and are often characterized by a series of deep parallel cuts [Romano, 1962], which can lead to traumatic or surgical amputation and significant blood loss; wounds immersed in water tend to bleed more freely, as the body's coagulation time is increased. Long periods of recovery and rehabilitation may be required. [Hargarten, 1992] Water-borne organisms can infect the wounds, further complicating recovery. [Price, 1987; Lineaweaver, 1988]

National costs for the treatment and rehabilitation of propeller injuries have never been estimated. However, in one case series of severe propeller injuries reported by Hargarten et al., the average cost for hospital and physician care alone exceeded $100,000 per injury. [Hargarten, 1992]

TABLE 2.

Struck by Boat or Propeller

Injury and Fatality Rates Per Million Boats
U.S. Coast Guard Boating Statistics Data, 1976 – 1990

Year	Boats x Million	Fatality rate	Injury rate	Total rate
1976	12.8	0.9	8.7	9.7
1977	13.3	0.4	8.0	8.4
1978	13.6	1.2	7.0	8.2
1979	14.1	1.3	4.9	6.2
1980	14.6	0.8	6.0	6.8
1981	15.1	0.5	5.5	6.0
1982	15.5	0.7	4.3	5.0
1983	15.8	1.1	7.2	8.3
1984	16.3	0.5	4.8	5.3
1985	16.7	1.0	5.9	6.8
1986	17.3	0.9	7.7	8.6
1987	17.7	0.7	6.5	7.2
1988	18.4	0.6	2.2	2.8
1989	19.0	0.3	3.2	3.5
1990	19.5	0.4	9.2	9.6

Epidemiology

Between 1976 and 1990, the U.S. Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its annual *Boating Statistics* report category "struck by boat or propeller."[2] During this 15-year period, the reported number of injuries and fatalities varied, with no discernible upward or downward trend. [See Tables 1 an 2; Figures 1 and 2] Annual fatalities ranged from a low of 5 in 1977 to a high of 18 in both 1979 and 1983 (average 11.7 per year), while non-fatal injuries ranged from a low of 40 in 1988 to a high of 180 in 1990 (average 95.9 per year). Based on Coast Guard estimates of the number of recreational boats in the United States, the fatality rate per million boats has varied from a low of 0.3 in 1989 to a high of 1.3 in 1979.[3] The non-fatal injury rate per million boats was at its lowest in 1988 at 2.2 and peaked during the 15-year period in 1990 at 9.2. [USCG *Boating Statistics*, 1976-1990]

---

[2] Analysis of the raw (uncompiled) Coast Guard data may reveal a different number of injuries. This report relies upon the aggregated statistics compiled and made available by the Coast Guard, to the public, and to those who formulate boating safety policies. See, for example, *Boating Statistics* data supplied to Congress [USCG, 1988] and to the media. [Williams, 1989]

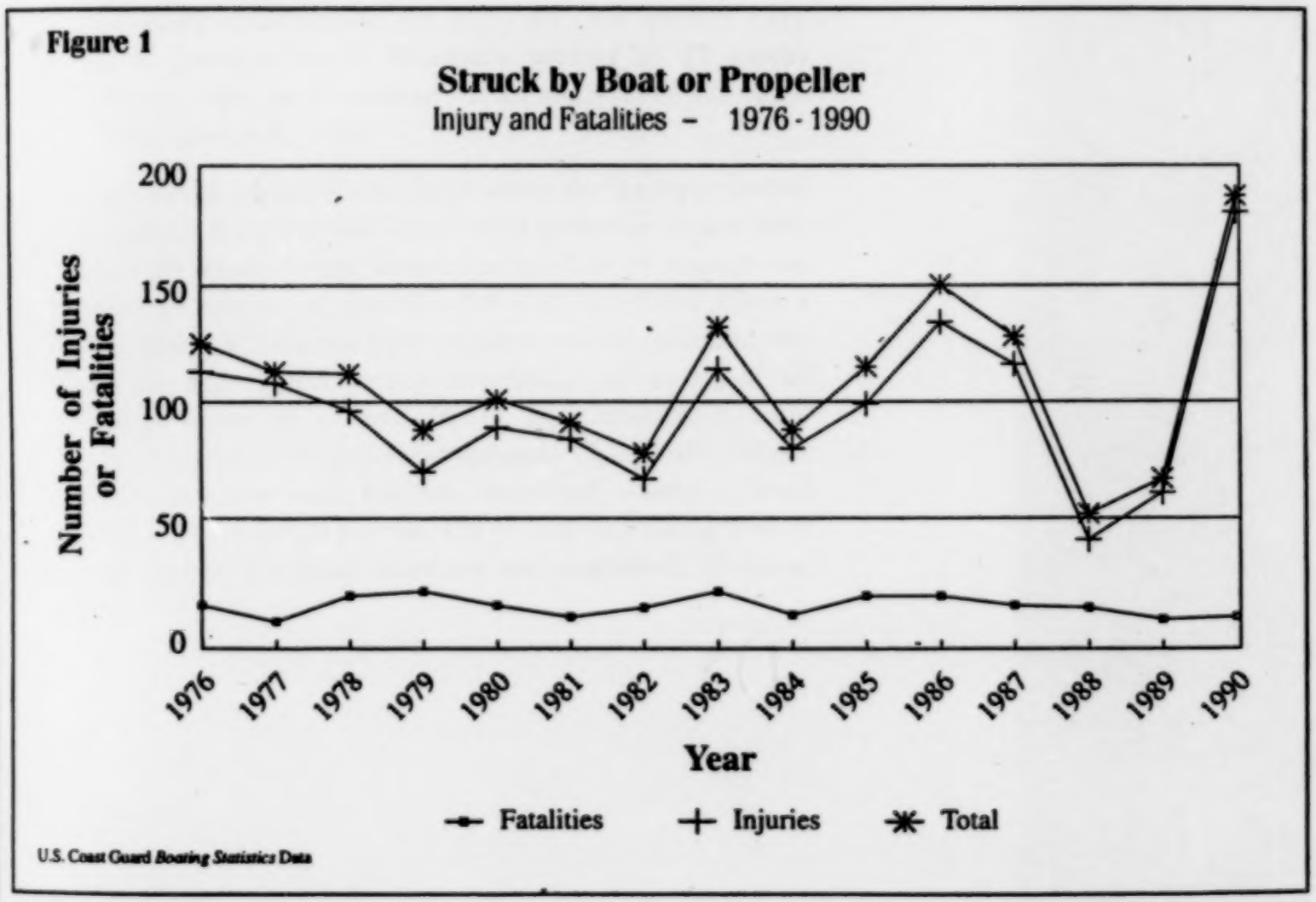
[3] It is important to recognize that a more accurate measure of exposure, to use as the denominator for a rate calculation, would be person-hours of propeller-driven boating activity, rather than raw numbers of boats. These more precise data are not readily available for each of the past 15 years.

For a number of reasons, Coast Guard data for propeller injuries represent substantial and systematic underreporting.[4] Estimates of the true annual incidence of propeller injuries have been as high as 3,420 in a Coast Guard analysis of its own 1978 data, for a rate of 251 per million boats. [Freund, 1979]

---

[4] See discussion beginning at page 8, infra.

Figure 1



U.S. Coast Guard *Boating Statistics* Data

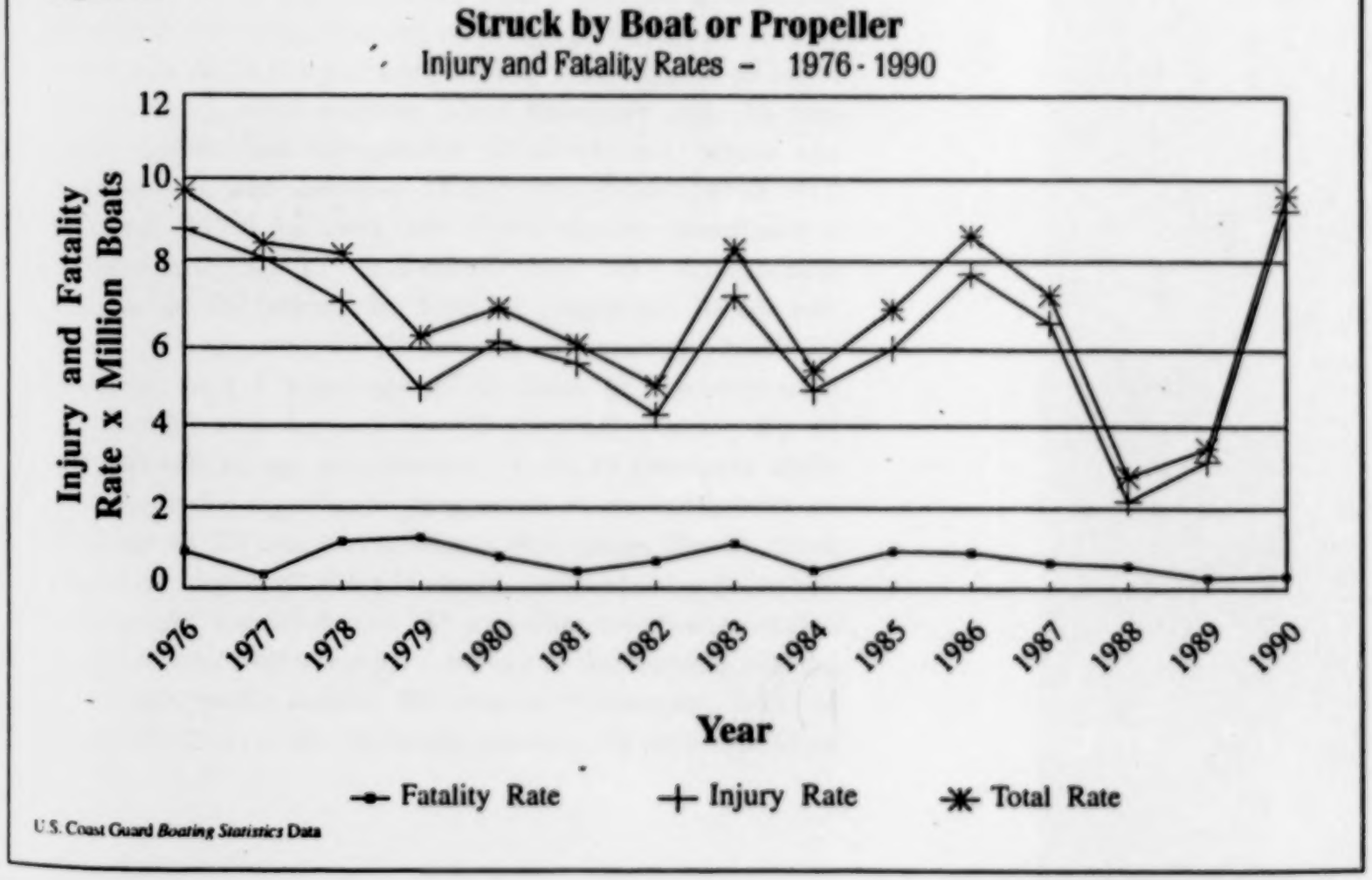
Reports in the medical and scientific literature as well as unpublished studies performed by the Coast Guard provide much of our additional understanding of the epidemiology of propeller injuries. Propeller-related case fatality rates[5] based on reported case studies vary from 15 percent (in a literature review of 77 cases) [Kutarski, 1989] to 23 percent (in an analysis of 223 cases in 1978). [Freund, 1979]

Propeller strikes to the head cause the largest number of deaths: a Coast Guard analysis of propeller injury data from 1978 showed that, where the location of impact was known, 39 percent of fatalities (16 of 41) involved solely a head injury. When multiple impacts which included the head are aggregated, nearly two-thirds (27 of 41) of all fatalities involved a head injury. By comparison, only about 5 percent of non-fatal injuries (7 of 144), where impact location was known, involved solely a head injury, with about 15 percent (21 of 144) including a head impact when multiple locations are combined. [Freund, 1979]

---

[5] A case fatality rate compares the number of individuals who die from a particular injury or disease to the total number affected within a specified time. Therefore, if a case series reported 20 propeller injuries, 5 of which result in a fatality, then the case fatality rate (over the time frame of the case series) would be 25 percent. [Lilienfeld, 1977]

Figure 2



U.S. Coast Guard *Boating Statistics* Data

Coast Guard annual boating data do not report age and sex breakdowns for the various injury scenarios. In the same 1979 Coast Guard analysis (of its 1978 data), however, 72 of 223 propeller injury victims (combining fatal and non-fatal injuries) were age 0-19 (32 percent); 92 were age 20-39 (41 percent); and 27 were age 40 or older (12 percent), with another 32 of unknown age (14 percent). More than one-quarter of all victims, where age was known, were between 16 and 19 years old (49 of 191). [Freund, 1979] In 1984, the Coast Guard completed a similar analysis of its limited data with comparable results: of 58 "struck by boat or propeller" injury victims[6], 19 were are 0-19 (33 percent); 27 were age 20-39 (47 percent); and 2 were age 40 or older (3 percent), with another 10 of unknown age (17 percent). Among the 48 victims whose age was known, 16- to 19-year-olds again represented a significant proportion of the total, with 11 of those 48 (23 percent) falling in that range. [Traub, 1984] Similarly, one 1987 Florida study, conducted by Price and Moorefield, found that of 195 propeller injuries identified from 1979 to 1983 through a survey of the members of the local orthopedic society, 89 were to victims age 0-19 (46 percent); 65 were age 20-39 (33 percent); 16 were age 40 or

---

[6] The 1984 study analyzed only a 25 percent sample of the more than 240 "struck by boat or propeller injuries" contained in the Coast Guard's 1983 data. Of the 58 analyzed, 47 were struck by the propeller, 8 by the boat only, with 3 unknown. Because the study does not separately analyze boat and victim characteristics for struck by boat versus struck by propeller injuries, these data have been aggregated to determine the distribution of this injury scenario.

older (8 percent); the ages of 25 victims (13 percent) were not reported. [Price, 1987]

When data on victim and operator sex are available, males predominate in both categories, probably reflecting the large proportion of young males among participants in motorized water sports. The Coast Guard's 1979 study found that 171 of 222 victims (77 percent) and 197 of 211 operators (93 percent), where sex was known, were male. [Freund, 1979] In the 1984 study, 42 of 58 "struck by boat or propeller" victims (72 percent) were male (operator information was not reported). [Traub, 1984]

Waterskiing is the activity most often associated with propeller injuries. A review of medical and technical literature on water-skiing-related injury reveals that, in a sport fraught with hazards, propeller strikes inflict the most damage. [Paterson, 1971] "Accidents involving propellers remain the chief cause of devastating and mutilating injuries," Banta reported in 1979.[7]

Waterskiers themselves are the victims in about one-third of propeller injury incidents (27 percent in the 1979 Coast Guard analysis and 35 percent in the 1984 analysis). [Freund, 1979; Traub, 1984] Usually a skier is struck by the towing boat or by another boat whose driver fails to notice the downed skier. Price and Moorefield found that 48 percent of their cases involved waterskiing, with another 36 percent resulting from falls overboard. Just over 10 percent occurred to people already in the water,

[7] Some physicians have attributed these injuries to operator negligence or the lack of a vigilant observer in the tow boat. [Grace, 1974; Hummel, 1982]

swimming or diving. [Price, 1987] The 1979 and 1984 Coast Guard studies reported that 48 to 61 percent of all victims were boat operators or passengers; 44 to 57 percent were the operator or passenger of the very boat which struck them. [Traub, 1984; Freund, 1979]

Waterskiing injury scenarios often involve a passenger or operator of a ski boat thrown overboard during sharp turns and rapid acceleration or deceleration, followed by contact with the boat's propeller. Alternatively, the boat may collide with another boat or object while the operator's attention is diverted. The collision then causes a fall overboard and a propeller strike. Some details from a 1987 Coast Guard report illustrate the variety of waterskiing-related accident scenarios:

State	*Date*	*Description*
MA	07.14.84	Ski, passenger thrown out and hit by prop.
NM	08.08.84	Teen, ski, backed up to pick up skier, prop cut person on head.
NY	09.01.84	Teen, skier in water awaiting tow, hit by other ski boat, probably killed by prop.
OR	08.07.84	Teen, ski, passenger on bow, rapid deceleration, falls forward overboard, hit by boat and prop.
TN	07.21.84	Teen, ski, hit a log, passenger on bow thrown out, severe cuts to abdomen, probably prop.

All of these injuries were fatal. [Purcell, 1987]

Waterskiing coupled with today's very powerful marine engines creates an especially dangerous combination. "It is obvious that with the increasing popularity of waterskiing, and with the burgeoning number of boats powered by high speed outboard propellers . . . , we can expect correspondingly large numbers of dramatic accidents to water skiers and passengers in the boats." [Jackson, 1965] This comment was published in 1965, when the number of pleasure boats in the U.S. was about six million. Today, there are more than 19 million. [Red Cross, 1991] Furthermore, the "high speed" propellers Jackson described are slow by today's standards. He described two separate, disabling brain injuries each inflicted by a 25 horsepower motor. More recently, accordingly to Coast Guard analyses, nearly all reported propeller injuries have involved motors of greater than 25 horsepower. For reported injuries and fatalities where horsepower was known, well over half (55-62 percent) of the motors involved were greater than 75 horsepower. [Freund, 1979; Traub, 1984] Many pleasure boats today are powered by engines rated at several hundred horsepower. Information about the speed of boats involved in propeller injuries is also incomplete.[8] In the Coast Guard's 1979 study, boat

[8] The National Boating Safety Advisory Council's 1989 report of its propeller guard subcommittee (see Part Three) claims that "approximately 80 percent of all accidents occur when a boat is operating at speeds in excess of 10 miles an hour . . . " No data or specific citation supporting this assertion were presented. According to the same report, casualties occurring at lower speeds "typically appear to happen when the operator is in the process of picking up a fallen water skier, moving in the vicinity of swimmers, or inadvertently putting an engine in gear when swimmers are using a boarding ladder or platform." [NBSAC propeller guard subcommittee, 1989]

speed in miles-per-hour was known for only 21 of 52 fatalities and 38 of 171 non-fatal injuries. Of the fatalities where boat speed was known, four (19 percent) occurred at speeds between 0-10 mph; 5 (24 percent) at 11-20 mph; 6 at 21-30 mph (29 percent); and 6 (29 percent) at speeds greater than 30 mph. For non-fatal injuries, the distribution is somewhat different, with a greater proportion of incidents at slower boat speeds. Of the 38 injuries where boat speed was known, more than two-thirds occurred at boat speeds of 10 mph or less (26 injuries of 68 percent); 5 at 11-20 mph (13 percent); 5 at 21-30 mph (13 percent); and 2 at speeds greater than 30 mph (5 percent). [Freund, 1979]

Distribution of Propeller Injuries – 1979 and 1984 Coast Guard Studies

1. More than one-quarter of victims were between 16 and 19 years of age.

2. Approximately three-quarters of victims and more than 90 percent of boat operators involved in propeller injuries were male.

3. About one-third of propeller injury victims were water skiers.

4. Most propeller-related fatalities involved a head impact. Fewer than one-fifth of non-fatal injuries involved a head impact.

5. More than half of the boats involved in propeller injury incidents were powered by engines greater than 75 hp.

6. Where precise boat speed was known, approximately 20 percent of fatalities and more than two-thirds of non-fatal injuries occurred at speeds of 10 mph or less.

Vessels involved in propeller injuries are typically in the 15 to 20 foot range – the same range in which most powered boating injuries occur. [Freund, 1978; Traub 1984; USCG propeller guard subcommittee, 1989] Riders of the much smaller, increasingly popular "personal watercraft" or "jetskis" (powered by water jet engines) have also been killed by propellers of other boats following a collision or fall. [Hummel, 1982; Scott, 1989]

No study we located described the temporal or weather-related variations associated with propeller injuries, but it is reasonable to assume that they occur most frequently under the same conditions as other boating injuries – on summer weekends, in good visibility, and in good to fair wind and weather conditions – when boating activity is at its peak. [USCG *Boating Statistics*, 1990; Red Cross, 1991; Baker et al., 1992]

Underreporting

Propeller injuries are an internationally recognized problem. Case reports from the medical literature of Australia, Great Britain, Yugoslavia, the former Soviet Union, Israel, Canada, and most extensively the United States,

document the hazards of unguarded propellers. [Paterson, 1971; Sleight, 1974; Kutarski, 1989; Sustic, 1970; Batinica, 1973; Budrin, 1976; Levy, 1979; Grace, 1974; Mann, 1976; Price, 1987; Lineaweaver, 1988] There is little consensus regarding the actual incidence of propeller injuries, however, because data collection is inadequate and reporting methods unreliable or misleading.

In the United States, the Coast Guard has federal jurisdiction over recreational boating and is required to collect and publish boating accident statistics. [Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq.* (1991)] The Coast Guard collects data on boating-related casualties through a system which requires that the operator of any vessel used for recreational purposes file a report if that vessel is involved in an accident resulting in:

1. Loss of life; or

2. Personal injury which required medical treatment beyond first aid; or

3. Damage to the vessel and other property exceeding $500 ($200 before 1989); or

4. Complete loss of the vessel. [USCG *Boating Statistics*, 1990]

The reports are filed with the authorities of the state in which the incident occurred (or directly to the Coast Guard if in Alaska) and the states provide copies of the accident reports to the Coast Guard. All incidents which meet the federal reporting requirements (above) are included in the Coast Guard's annual *Boating Statistics* compilation.

This system misrepresents the true number of propeller injuries in at least three ways:

(1) The Coast Guard's "type of accident" categories do not distinguish between impacts with propellers and those with the hull of the boat or other underwater appendages. Instead, all such incidents are grouped together as "struck by boat or propeller," in the Coast Guard's annual report.

Inadequacy of Coast Guard Propeller Injury Data

1. The Coast Guard estimates that it receives reports for less than ten percent of non-fatal injuries.

2. The Coast Guard's annual *Boating Statistics* compilation categorizes injuries only by the first event in any injury scenario.

3. *Boating Statistics* aggregates propeller injuries and those caused by contact with the boat hull in a single category, "struck by boat or propeller."

---

(2) The "type of accident" tables, which include the category "struck by boat or propeller," refer only to the first event leading to the injury. A fall overboard which was followed by a fatal propeller strike, for example, appears only in the "fall overboard" category, even if it was the propeller strike that led directly to the fatality. In fact, no propeller injury which was preceded by another event for which the Coast Guard has established a separate category (such as capsizing, sinking, or collision with

another vessel) would be classified as a "struck by boat or propeller" incident in the annual *Boating Statistics* report.

(3) The Coast Guard estimates that it receives reports for only five to ten percent of non-fatal reportable injuries[9] (reporting on fatal injuries is believed to be fairly complete). [USCG, *Boating Statistics*, 1979-90] While the agency is to be commended for its candor in admitting the reporting rate for non-fatal injuries, it should not be satisfied with this low level of reporting, nor can it formulate reliable injury prevention policy without more complete data. In fact, in order to improve the completeness of its non-fatal propeller injury data, the agency's own 1987 study recommended that the Coast Guard should begin active random sampling of hospital emergency rooms "rather than the passive voluntary collection of reports that is presently used." To date, it has not done so.[10] In addition, according to the same study, the quality of individual case reports "varies from an official Coast Guard inquiry to the scribblings of an inebriated teenager." [Purcell, 1987]

Next to the non-reporting of many incidents, classification of "accident type" by the first event leading to the injury is perhaps the most serious factor in the Coast

---

[9] It has been suggested, however, that the likelihood of reporting for non-fatal injuries is correlated to the severity of injury, so that the Coast Guard data may include more of the most severe propeller injuries. No data supporting this suggestion were located. Furthermore, even lesser (though still serious) injuries are worthy of enumeration and prevention.

[10] A study which does utilize more active data collection is currently being conducted by the Centers for Disease Control with Coast Guard funding. See pages 29-30, infra.

Guard's official underreporting of propeller injuries and serves to disguise the true number of deaths and injuries caused by propellers. An analysis of Coast Guard data for 1983-1987 found that less than half (45 percent) of 1,304 casualties which involved "struck by boat or propeller" were classified as such in the published statistics for those years. Another one-third of these underwater impact cases were coded as "falls overboard" because that was the first event in the injury scenario. More than one-tenth began with a "collision with another vessel or fixed object." [Kerlin, 1988] The Coast Guard's unpublished 1978 analysis of its own accident reports discovered 52 fatalities and 171 injuries caused in whole or in part by propeller strikes; the Coast Guard's *Boating Statistics* report for that year, however, lists just 16 fatalities and 95 injuries as "struck by boat or propeller." Therefore, coding by "first event" caused even known propeller strikes to be underreported by about two-thirds for fatalities, and by about half for non-fatal injuries. In fact, the actual number of non-fatal propeller injuries may have been as high as 3,420, the report states. This assumes that the 171 reported to the Coast Guard[11] represent as few as 5 percent (due to non-reporting) of all non-fatal injuries. [Freund, 1979]

In 1984, the Coast Guard repeated this analysis with similar results. Although it analyzed only a 25 percent sample of the 246 "struck by boat or propeller" deaths and injuries for 1983, this study found 11 propeller-

[11] This figure includes those propeller injuries that were retrieved from other Coast Guard categories both which were initially coded by some other "first event."

related fatalities and 35 non-fatal injuries, for an estimated reported total of 184. However, the Coast Guard's *Boating Statistics* report for 1983 lists just 131 (18 fatal and 113 non-fatal) injuries in the "struck by boat or propeller" category. [Traub, 1984; USCG *Boating Statistics*, 1983]

A 1991 Red Cross "National Boating Survey," supported by a Coast Guard grant, further illustrates the magnitude of the Coast Guard's official underreporting of propeller injuries. The Red Cross study employed a telephone survey of a statistically representative group of boating and non-boating households. A total of 3,700 boating households answered the survey questions, and from this group national estimates were extrapolated. Survey respondents were asked to report their involvement in any "critical incidents or accidents" from October 1, 1988 to September 30, 1989. A "critical incident or accident" could range from an accident involving personal injury or property damage to a scenario in which the respondent "thought a dangerous situation might develop but didn't." Finally, respondents were asked to provide additional information about the most severe critical incident or accident in which their household was involved during the study period.

The Red Cross survey estimated that 236,599 reportable incidents (according to the Coast Guard's reporting criteria) occurred during the one-year study period. During the same period, the Coast Guard received reports for only 6,060 reportable incidents. Assuming, as the Coast Guard asserts, that Coast Guard statistics for fatal injuries are fairly complete (even though some propeller fatalities are "hidden" due to first event coding) then the Coast

Guard actually receives reports for only about 2.5 percent of all non-fatal incidents. [Red Cross, 1991]

Noting that "the most devastating types of injuries result from propeller contact and high speed impact," the Red Cross study separated "struck by boat" and "struck by propeller" injuries, and estimated that 2,013 reportable and 4,022 unreportable (not meeting Coast Guard reporting criteria) deaths and injuries associated with propeller contact were sustained during the one-year study period.[12] The Red Cross estimates, although based on a small sample of propeller injuries, correspond to an annual rate that is at least 34 times the 117 deaths and injuries in the category "struck by boat or propeller" reported by the Coast Guard for *all* of 1988 and 1989.

Two independent studies also demonstrate that the Coast Guard has not accurately monitored and reported the true incidence of propeller injuries. Price and Moorefield surveyed members of the Florida Orthopedic Society and, with a 50 percent response rate, discovered 195 propeller injuries from 1979 to 1983 – nearly six times the number of vessels involved in "struck by boat or propeller" incidents reported to the Coast Guard during the same five-year period in Florida. (The Coast Guard annual report provides type of accident breakdowns for each state only by the number of vessels involved.) [Price, 1987; USCG *Boating Statistics*, 1979-1983]

---

[12] The Red Cross study does not report confidence intervals for its national injury estimates. Given the small number of propeller injuries actually identified through the survey (less than 10), the confidence intervals may be quite broad.

Propeller Injury Data and Estimates

1. Based on Coast Guard reports of 171 non-fatal propeller injuries, and the assumption that these reports may represent only 5-20 percent of non-fatal injuries, Freund estimated between 855 and 3,420 such injuries for 1978. The Coast Guard officially reported 95 "struck by boat or propeller injuries" in 1978.

2. Based on a nationwide representative survey, the Red Cross estimated 2,013 propeller deaths and injuries occurring in the one-year period between October 1, 1988 and September 30, 1989. The Coast Guard officially reported just 66 "struck by boat or propeller" deaths and injuries for 1989.

3. Based on a survey of the members of the Florida Orthopedic Society, Price identified 195 propeller injuries in Florida alone between 1979 and 1983. The Coast Guard officially reported just 34 "vessels involved" in "struck by boat or propeller" injuries in Florida for those years.

Hargarten et al. examined data from four different sources to determine the number of fatalities and injuries due to propeller strikes in Wisconsin from 1987 through 1989. They used death certificates, the Wisconsin Department of Natural Resources (DNR) boating accident files, the U.S. Coast Guard boating statistics for Wisconsin, and a survey of emergency department medical directors at 126 acute care hospitals within the state. The U.S. Coast Guard reported only five "vessels involved" in a "struck by boat or propeller" incident in Wisconsin during the study period, by comparison with 23 deaths and injuries

identified through DNR records and 14 non-fatal injuries discovered by the state emergency department survey. The number of vessels involved in propeller injuries reported by the Coast Guard was, therefore, less than 25 percent of the deaths and injuries reported by the Department of Natural Resources and 36 percent of those from the survey of emergency departments. [Hargarten, 1992]

Based on these studies, the number of people injured and killed by motorboat propellers could range from 4.6 [Hargarten, 1992] to 34 [Red Cross, 1991] times the number listed as "struck by boat or propeller" in *Boating Statistics* for any year.[13] Using the factor of six determined by Price and Moorefield (with only a 50 percent response rate), estimates for fatal and non-fatal propeller injuries combined would range in the last decade from a low of about 300 in 1988 to a high of 900 in 1986. Even more dramatically, using the factor of 34 derived from the Red Cross survey, there would be an estimated 54,842[14] fatal and non-fatal propeller injuries for the years 1976 to 1990, or an average of more than 3,600 per year. This figure is consistent with Freund's 1978 estimate of as many as 3,420 injuries per year, although it is unlikely that the level of underreporting would remain constant from year to year.

---

[13] There are limitations associated with comparing injuries (from the state studies) with "vessels involved" (from the Coast Guard *Boating Statistics* state data), but the general magnitude of Coast Guard underreporting is still evident.

[14] This figure is derived by multiplying the Coast Guard's officially reported 15-year total of 1,438 propeller injuries by 34.

Conclusion

Propeller injuries present an often devastating and costly clinical picture, demanding a clear understanding of their incidence, distribution and risk factors. The Coast Guard substantially and systematically underreports the number of propeller injuries in the United States. Data from a number of sources, including special Coast Guard reports, indicate that the true number of propeller injuries and fatalities may be closer to the 2,000-3,000 per year estimated by the Red Cross and Freund than to the approximately 100 per year officially reported by the Coast Guard.

The Coast Guard generally points to the steady decline in the overall boating fatality rate (for all accident scenarios, expressed as deaths per 100,000 boats) as evidence of the increased safety of recreational boating and the effectiveness of its safety programs. Even as underreported in Coast Guard data, however, no downward trend is evident for propeller-related deaths and injuries. [See figures 1,2] Even if some downward trend were discernible, however, the personal and social costs associated with propeller injuries are unacceptable, given the strong prospects for their prevention.

Part Two

Preventing Propeller Injuries: Feasibility of Countermeasures

Introduction

The large number of severe and fatal injuries caused by propellers demands a thoughtful and effective injury

prevention strategy. Although a 1984 Coast Guard study concluded that operator training would have made no difference in the vast majority of propeller injury incidents,[15] [Traub, 1984] both marine engine manufacturers and the Coast Guard have continued to stress operator training and improved enforcement of boating regulations as the best way to reduce the incidence of propeller injuries and fatalities. [NBSAC propeller guard subcommittee, 1989] Neither of these approaches, however, can guarantee that a person will not be in the path of a boat driven by a drunk or simply inattentive operator. Furthermore, with an estimated 19 million recreational boats in the United States, the number of potential operators requiring training is very large. And, in scenarios involving a fall overboard, in the few seconds between the fall and contact with the boat's propeller, operator training is probably of little value. Finally, as the Coast Guard's own 1979 propeller injury study explained, a major difficulty with an education strategy is that "there is no particular operator or victim characteristic that produced a large number of propeller-related accidents. Further, the accident scenarios are diverse." [Freund, 1979]

Enforcement of current boating laws has proved difficult in the recreational settings in which many propeller injuries occur – on crowded waterways, well off shore, and often under the influence of alcohol. In fact, alcohol is implicated in as many as two out of three boating

[15] Research in motor vehicle crash injury reduction has also demonstrated that operator training programs alone are relatively ineffective and may even enhance the risk of injury by increasing operator exposure. [Robertson, 1992]

fatalities. [Metropolitan Life Insurance Company, 1984; National Committee on Injury Prevention and Control, 1989] In some areas, 40 percent of operators involved in boating fatalities were judged to be legally drunk. [Metropolitan Life Insurance Company, 1984; Peeler, 1990] While a number of states outlaw operating a boat while intoxicated, marine police enforcement has generally been understaffed and may identify the impaired operator only after an injury has occurred.

Automatic protection

Rather than focusing primary attention on attempting to modify the behavior of potential victims through training or education, the most successful injury prevention approaches rely on automatic or passive protection, requiring no action by the potentially injured person to prevent that injury. [Robertson, 1984; Haddon and Baker, 1981; Kelley, 1975; Haddon, 1970] For product-related injuries, automatic prevention generally involves changes in product designs in order to protect everyone at risk. [National Research Council, 1985; Baker et al., 1992]

In order to better systematize thinking about potential modes of injury prevention, beginning in the 1960's William Haddon devised and refined a list of ten types of strategies to reduce or eliminate injuries. Each is concerned with managing the energy release which produces injury or with ameliorating the consequences of the transfer of energy to people.[16] [Haddon, 1970] In the context of

[16] For additional information on the use and importance of the Haddon strategies for injury control, see: Haddon, W., On

propeller injuries, Haddon's first and sixth strategies (preventing the marshalling of the energy in the first place and interposition of a material barrier to separate humans from the energy exchange) have the most relevance. These strategies are exemplified by employing water jet propulsion to eliminate propeller blades and by installing propeller guards to separate humans from the source of injury.

Strategies for Preventing Propeller Injuries

1.	Non-Automatic:	Educate boaters and potential victims to alter their behavior.
2.	Automatic:	Replace propeller blades with water jet engines.
		Separate people from propellers with propeller guards.
		Make propeller blades themselves safer.

The public health practice of injury control has demonstrated that automatic injury intervention strategies are the most effective.

Eliminating Propellers: Water Jet Propulsion

Technology to eliminate propellers entirely has been available for many years through the use of water jet

---

the Escape of Tigers, *Technology Review* 72 (7) May 1970; National Committee for Injury Prevention and Control, Injury Prevention: Meeting the Challenge. Oxford University Press, 1989.

propulsion. [Barham, 1976] At the most basic level, a water jet functions by scooping water into internal pumps which had energy and expel the water through a nozzle. The outgoing water is discharged with a greater velocity than that of the incoming stream and thrust is achieved. [Brandau, 1967]

By the early 1950's, a few manufacturers began to make water jet propulsion units available to recreational boaters in the U.S. market. [Barham, 1976] However, the Mercury Marine division of the Brunswick Corporation (makers of Force, Mariner and Mercury outboard motors) and the Outboard Marine Corporation (OMC, makers of Johnson and Evinrude engines), which together control approximately 85 percent of the U.S. marine recreational propulsion market, do not currently offer jet drive units for use on recreational boats.

A 1973 Mercury Marine internal memorandum, however, described a test of the performance characteristics of a "Hall jet" (apparently manufactured by another company). The test report noted both the improved maneuverability and worsened fuel efficiency of a boat equipped with the jet drive and concluded that "the concept of an outboard jet is good, being able to operate in areas a propeller cannot. Further, it is our feeling that the jet unit we tested could be improved upon." [Schenk, 1973] In 1974, an OMC engineer reported that the water jet has "distinct advantages in the areas of mechanical simplicity and freedom from damage by underwater objects. It also has the ability to accelerate a boat to

planing[17] speed more rapidly, and can plane a heavier load than an equivalent propeller driven boat." The author asserted that the jet is not as efficient as a conventional propeller at lower speeds, and is less maneuverable and noisier, but concluded that "in the future, improvements will be made in the design and performance of both water jet and propeller driven units . . . " [Lambrecht, 1974]

Today, however, outboard and inboard motors equipped with propellers remain the primary propulsion system for recreational boats. Water jet propulsion is not in wide use for pleasure craft other than in "jet-skis" or other "personal watercraft." American Suzuki Motor Corporation offers three models of a jet drive system for use on recreational boats, but so far has not made significant inroads into that market. The 1991 Red Cross boating survey estimated that 249,000 personal watercraft were equipped with a jet drive, compared with only 153,000 jet drives associated with all other boats. Therefore, of the more than 19 million boats in the United States, less than three percent are equipped with a jet drive. [Red Cross, 1991]

Separating Propeller Blades from People: Propeller Guards

If most boats remain propeller-driven, automatic protection from propeller injuries can be achieved with the

[17] When a boat gains enough speed to skim on the surface of the water it is said to "plane." [Noel. 1988]

placement of a shield between people and spinning propeller blades. Placing a material barrier between humans and potentially injurious energy transfers has a long history as a successful injury control measure. Guards are used to separate an operator's hands from spinning tablesaw blades, lawnmowers are equipped with footguards to protect an operator's toes from the blades, and air bags come between human bodies and injurious contact with an automobile's interior structure.

Private entrepreneurs have been refining guards for motor boat propellers since at least 1910. With the exception of several short-lived projects from OMC and Mercury Marine, however, major marine propulsion manufacturers have not committed significant research and development resources to design and test devices intended to lessen the dangers of unguarded propellers.

Propeller Guard Patents and Private Entrepreneurs

In the United States, the U.S. Patent and Trademark Office evaluates new technologies seeking patent protection. In order to gain such protection, a device must be novel, not obvious, and "fully enabling" – able to perform as claimed in the patent application. When a patent is granted, this generates a presumption that the invention is feasible. [Patent and Trademark Office, 1987]

Since 1910,[18] at least 21 patents have been awarded by the U.S. Patent Office for propeller guards designed to

[18] The earliest "propeller guard" patent we located was awarded to J.L. Hawthorne in 1910. [Hawthorne, 1910] The device featured a rectangular guard frame attached to the boat hull and extending beneath the propeller. When the frame

separate outboard motor propellers from persons or other objects in the water. The primary stated objective of most of these patents is to protect the propeller blades from damage. Nine of the patents, however, describe "protecting personnel in the water " as an important objective for the invention. All of the patents implicitly recognize that it is possible and desirable to separate propellers from other objects, including human beings.

The inventions fall into three major configurations: 1) guards completely surrounding the propeller with bars or wire mesh intended to allow water to pass through but prevent human contact with the propeller blades (so-called "catcher's mask" or "cage" guards); 2) guards in the shape of a ring which surrounds only the outside edge of the propeller; and 3) guards which wholly enclose the propeller within a tunnel or tube, commonly referred to as a "Kort nozzle." (A Kort nozzle also functions to funnel water toward the propeller blades in order to increase engine efficiency at low speeds.) [U.S. Patents, 1910-1991; NBSAC propeller guard subcommittee, 1989; Seidman, 1992]

In 1955, Theodore Francis Crew patented a device resembling a screen or cage that would surround an outboard motor propeller. The object was to "provide means for completely housing the propeller and drive mechanism of the motor to prevent the loss or injury of the hands, arms, legs, or other parts of the body of those

---

struck an underwater obstruction (such as a submerged rock), the device caused the propeller to swing up and over the obstruction to prevent contact.

who may accidentally come in contact therewith during the operation of the motor." [Crew, 1955]

"Boating accidents due to injuries to persons coming in contact with the rotating propeller, while swimming adjacent to the boat, have increased to a point that protection is required to prevent such injuries," reported Frank Hogan in a patent awarded in 1963. His patent for a cage-type propeller guard was intended to ensure "absolute protection against accidental bodily contact with a whirling propeller." [Hogan, 1963]

OMC's 1981 patent for a ring-shaped guard was designed for "augmenting propeller thrust and/or guarding the propeller against underwater obstructions." No discussion of any human protection capabilities of the guard is included. [Holtermann, assignor to OMC, 1981]

In 1987, Dennis Eller patented a ring-shaped propeller guard as "a personal safety feature," noting that "water skiers and other swimmers have been accidentally injured by boat propellers which are unprotected."[19] [Eller, 1987]

Taking a somewhat different approach, in 1991 Lawrence Thibault and Richard Pollini of the University of Pennsylvania (to which their patent was assigned) developed a "safety propeller." recognizing that "the rapidly turning propellers . . . pose a constant threat of serious bodily injury," their patent featured a single ring attached to the distal end of the propeller blades, able to spin with

---

[19] Eller's guard also sought to improve the performance of the engine by channeling water more efficiently rearward of the propeller.

the blades. The design employed a number of potential systems to manage the energy of an impact so that it would "substantially reduce or mitigate serious injury resulting from the collision of power boat propellers with humans or animals." Thibault reports that the "safety propeller" can provide "sufficient energy absorbing capacity to significantly reduce injury to the human skull when the boat was moving at 30-35 mph," with only about an eight percent loss in power. [Thibault, 1991]

Small businesses and private entrepreneurs have also developed and marketed propeller guards. In 1978, San Diego boater Bryan Chadwell designed a propeller guard – a cylindrical stationary plastic ring surrounding the tips of the propeller blades. By 1986, Chadwell had refined his design and by 1988, more than 2,000 Chadwell guards were in use by the United States armed forces and by surf lifeguard services in Australia, New Zealand, and California. [Hogan, 1989; Chadwell, 1992] Recently, Marinemotive Engineering, a California company, marketed a product called a "Prop Mate." Advertising material for this double ring-shaped guard promised that "installation of Prop Mate on outboards, inboards and stern drive vessels can greatly reduce blade injuries to human and marine life"[20] while providing enhanced

[20] In fact, most Florida manatees bear scars or other deformities as a result of propeller or boat hull impacts. These scars are so common that they are used as a means to identify individual animals, with more than 900 individual animals so catalogued as of 1985. [Florida Light and Power, 1987; Reid, 1986] In an effort to avoid propeller injuries to manatees, at least one NASA ship employs a wholly enclosed propeller while operating in manatee waters.

propeller thrust and substantial fuel savings. [Marinemotive Engineering, Inc., 1990]

Hydrodynamic Tests and Analyses of Propeller Guards

In order to be accepted for use as an effective injury prevention device, propeller guards must not only prevent or lessen injury to foreseeable victims, but must also permit the boat/motor combination to function within acceptable limits. Boat engine manufacturers have argued that any propeller guard would unduly compromise the top speed and fuel efficiency of a recreational boat. They have also claimed that the greater underwater drag associated with guards can result in worsened or unpredictable boat handling characteristics. [NBSAC propeller guard subcommittee, 1989; Elliott, 1989]

Primarily in connection with litigation directed against engine manufacturers (principally OMC and Mercury Marine), a number of analyses of the hydrodynamic feasibility of propeller guards (including on-water tests of existing guards) have been conducted.

Robert Taggart Report

In 1979, Robert Taggart, a marine engineer, assessed propeller guard technology in "Review of the State of the Art of Swimmer Protection From Outboard Motor Propellers." He sought to determine whether a propeller guard which offered adequate protection without unduly compromising the propulsive efficiency of the boat and motor was within the state of the art. [Taggart, 1979]

Taggart initially determined that to protect persons in the water from propeller blades, the guard should at least surround the outer rim of the propeller (as a ring guard does) and that guards on the suction and discharge sides of the propeller were also desirable (as in a cage or "catcher's mask" configuration). [Taggart, 1979] Many of the propeller guards developed and patented in the last 50 years have these features. [U.S. patents, 1938-1991]

Taggart recognized that a propeller guard's effect on the propulsive efficiency of an outboard motor would be important to its acceptability: if a guard prevents the motor from delivering adequate propulsive thrust, he reasoned, no recreational boater would use it. Based on the self-imposed criterion that a guard may not detract at all from an outboard motor's propulsive efficiency, he concluded that no design manufactured at that time was hydrodynamically acceptable.

However, Taggart found that a propeller guard capable of adequate protection as well as propulsive efficiency had been within the engineering state-of-the-art since 1970. Knowledge regarding propulsor design "was such that adequate technology existed and was available in the open literature to design personnel protective devices for outboard motor propellers that would render these propulsors not only safer but more efficient. . . . Had it been the intent of an outboard motor propeller designer to provide swimmer protection, there was available to him in 1970 all of the technology required." [Taggart, 1979]

Outboard Marine Corporation Tests

Beginning in the late 1970's, Outboard Marine Corporation conducted a series of tests intended to assess the hydrodynamic performance characteristics of various propeller guards.

in 1978, OMC reported on its Project 441, "Propeller Guard Efficiency." The project's stated objective was to "minimize the performance penalties of a Kort nozzle or shroud device at normal runabout speeds." [OMC, 1978] OMC engineers tested the performance of a number of different guard designs for use with a 70 horsepower motor. They were especially concerned with the guard's effect on the top end speed of the boat and reported only these data. The most efficient guard tested reduced top end speed by 2.6 mph (from 36.7 mph to 34.1 mph), or 7.1 percent. The report concluded that "although this base ventilated nozzle was most successful in our tests, it does not necessarily constitute the optimum design. Undoubtedly further improvement in performance could be made, although it is questionable if that improvement would be very significant."[21] [OMC, 1978]

In 1977, OMC received a letter from its Australian division describing a combination ring and cage guard which local surf rescue squads were successfully employing. [Outboard Marine Australia Pty. Limited, 1977] In

---

[21] In 1981, OMC obtained a patent on the "propeller shroud" developed in Project 441 [Holtermann, assignor to OMC, Patent 4,304,558,1981], but has never offered it for sale with OMC engine products.

response, on October 22, 1979, OMC conducted tests comparing the Australian guard with its own guard, primarily intended for specialized use in small fishing boats. The tests demonstrated a 4.1 mph full throttle speed loss for the OMC guard (from about 28 mph to 24 mph, or 14 percent) and a 5.9 mph speed loss for the Australian guard (from about 28 mph to 22 mph, or 21 percent). [OMC, 1979]

For a 1980-81 OMC propeller guard test designated as Project 443, the stated objective was "to determine if the performance of an outboard motor used for water skiing would be unduly compromised by a guard which gives a high degree of protection from personal contact with the propeller." [OMC, 1981] Project 443 tested a guard offering even more personal protection by preventing axial as well as radial access (from the front as well as from the side) to the propeller of a 100 horsepower motor. The results showed a top end speed loss of 5.9 mph (from 39.2 mph to 33.3 mph, or 15 percent) and a reduction in fuel efficiency ranging from 18 to 31 percent. The OMC engineers also attempted to compare the static thrust generated by the motor with and without a guard. Initially, the guarded motor achieved greater thrust, but then the guard broke apart. The engineers concluded that "to be practical the guard would have to be strengthened . . . which would make manufacture more difficult and costly," [OMC, 1981]

Following these tests, OMC canceled Project 443. Silas Metcalf, an OMC engineer, later testified in a court case that the project was discontinued because it "had reached the point of no returns and there was no conceivable way that this project . . . then or now, could have met

the objective." [Beech, 1989] Today, OMC does not offer any propeller guards for pleasure planing craft intended to protect people in the water.

Mercury Marine Tests

In 1989, a lawsuit filed against the Brunswick Corporation claimed that its Mercury Marine division was liable for propeller-related injuries sustained as a result of Mercury's failure to guard one of its outboard motors. [*Pree v. Brunswick Corp.*, Cause No. 89-1996-C-1 (U.S. District Court, E.D. Missouri, 1989)] During the discovery phase of that litigation, Mercury Marine was asked to describe all of the propeller guard feasibility testing it had ever conducted. It responded with a list of ten projects from 1973 to 1990. Some involved tests of water jet propulsion devices. A brief description of several others will illustrate Mercury's test program.

A May 10, 1973 Mercury Marine report described a performance comparison test of a Tamco Sea Ray Boat powered by a Merc 75 engine with and without a propeller guard. The precise design of the guard was not specified, but the test reported a speed loss with the guard of 1.4 mph (16.5 mph compared to 15.1 mph, or 8.5 percent) at wide open throttle. Steering performance was described as "satisfactory." [Mercury Marine, 1973]

In March of 1974, Mercury again tested a propeller guard of unspecified design. The guard was installed on a Merc 110 engine and tested on a 12-foot Alumicraft boat. After 21 running hours, the test reported a loss in top speed of 4 mph (from 21.6 mph to 17.6 mph, or 18.5 percent). The report also described difficulties with the

guard becoming clogged with weeds and other underwater debris. Maneuverability of the boat was again characterized as "satisfactory" with "no noticeable change in turns." The report concluded that the guard "can be successful in protecting the prop in limited conditions such as rocks and stumps without limbs or small extensions. If this is to be an accessory item I feel the consumer should know of the full throttle performance deterioration and its ability to collect weeds excessively." [Mercury Marine, 1974]

In 1980, Mercury Marine conducted tests of a Williams propeller guard – a ring-shaped guard whose inventor (not affiliated with Mercury) apparently promised improved boat performance characteristics for his guard. Test runs employed a variety of boat and engine combinations. Top end speed loss ranged from 6.5 mph (15.5 percent) to 9.9 mph (20.2 percent), depending upon which boat and engine combination was tested. The report concluded that the improved performance claims for the Williams guard were false. It did note, however, that "at boat speeds under 28 mph the guard sacrifices very little" and "may decrease the chance of propeller damage in shallow rocky water and it may or may not decrease the risk of limb amputation if struck." [Mercury Marine, 1980]

During the Fall of 1988, Richard Snyder, principal engineer for product evaluation at Mercury marine, began work with the U.S. Marine Corps to develop an improved propeller guard for use on their small, beach assault craft. He designed several different cage guards and contracted with the Wald Wire and Manufacturing

Company in Oshkosh, Wisconsin to construct the prototypes. In tests supervised by the Marine Corps, a boat equipped with the Snyder/Wald cage suffered a lost in top end speed of 11 mph (from 37 mph to 26 mph, or 30 percent); its maneuverability was not impaired. The test report recommended further testing and concluded that "we are very close to the solution of what needs to be the configuration of the prop guard . . . " [Snyder, 1989]

Like OMC, Mercury does not yet offer any safety-oriented propeller guards for the recreational market.

Chadwell Guard Tests

Beginning in 1986, a series of tests were performed with first- and second-generation Chadwell guards to determine their effect on boat speed, handling, and engine fuel efficiency. These tests were performed by experts employed by attorneys involved in propeller injury litigation.

In February 1987, John Hill, a naval architect and marine engineer, reported the results of tests commissioned by a plaintiff's attorney and performed in December 1986 of several propeller guard designs, including the Chadwell ring guard. Hill determined that:

1. The time required to reach planing speed from the rest position was unchanged or reduced with the use of a Chadwell guard compared with an open propeller.[22]

---

[22] Hill reported that this is consistent with the documented fact that a ducted propeller produces more thrust and dynamic lift for the boat at low speeds. [Hill, 1987]

2. Boats equipped with a fixed guard (like the Chadwell guard) exhibited improved handling performance resulting from the greater effective rudder area.

3. The stopping ability of the boat improved.

4. Visibility was enhanced while the boat was on plane.

5. The top end speeds of the boats were lower (a reduction of 3.8 mph, or 11 percent) and their fuel consumption was greater.[23]

Hill concluded that "the tested fixed guards are hydrodynamically acceptable for use on planing pleasure craft, considering the intended uses and environments in which pleasure planing craft will be operated." [Hill, 1987]

In April and May 1987, Arthur Reed, also a marine engineer and naval architect, performed another series of tests on behalf of an injured plaintiff to evaluate the hydrodynamic characteristics of propeller guards. Reed equipped a Boston Whaler alternately with a 70 hp and a 150 hp outboard motor; then he ran the boat with and without an improved Chadwell guard. In "Comparative Performance Tests with a Second Generation Chadwell Propeller Guard," Reed concluded:

1. At low to moderate speeds, use of the guards resulted in higher speeds for the same RPM, compared to an unguarded configuration.

[23] These speed losses, however, were reported to be no greater than those ordinarily resulting from adding extra passengers or equipment to the boat. [Hill, 1987]

2. The presence of a guard caused a loss in top end speed of from five to seven percent. This loss was of the same order as might occur due to a non-optimum trim[24] setting.

3. The guards caused the boats to run at a more level trim. This may enhance safety as a result of improved operator visibility.

4. There were no significant differences in boat maneuverability between the guarded and the unguarded configurations, although the guarded boats were able to run tighter circles due to a decrease in the tendency of the boat to sideslip.

5. A boat with a guard was able to tow a waterskier successfully. [Reed, 1987]

In October 1987 and then again in June 1989, also in the context of litigation, Mercury Marine conducted its own tests of the hydrodyamic characteristics of boats equipped with Chadwell guards. The trials employed a variety of boat and engine configurations.

For the 1987 tests, losses in top speed for guard-equipped boats ranged from 4.3 mph (from 41.3 to 37.0 mph, or 10.4 percent) to 12 mph (from 55.0 to 43.0 mph, or 22 percent). Descriptions of the handling characteristics for the guarded versus unguarded boats varied from no significant difference to "very dangerous" (for a Chaparral boat equipped with a guarded Mariner 90 horsepower engine, which was described as listing to the

[24] "Trim" is the front to back inclination of a boat. The angle of trim is the angle between the plane of flotation and the mean waterline plane. [Noel, 1988; Watson, 1991]

starboard side at "an extremely uncomfortable angle"). [Mercury Marine, 1987]

The 1989 tests, supervised by Brian Chadwell, examined a number of different guards including improved Chadwell cage-type guards. Compared with an unguarded boat, the boat equipped with Chadwell guards experienced a loss in top speed of 6.5 mph (from 38.9 to 32.4 mph, or 16.7 percent). At an engine rating of 4000 RPM, the speed loss was only 2.8 mph (from 26.7 to 23.9 mph, or 10.5 percent). The report also noted that, compared with other guards tested, "[i]t was the consensus that the cages offered the least amount of steering torque (like no guards at all) . . . " [Mercury Marine, 1989] The guarded boat experienced a 0.4 miles per gallon reduction in fuel efficiency (from 2.5 to 2.1 MPG, or 16.0 percent), when both boats were compared at the same RPM (about 4500).

Propeller Guard Protective Effect Testing

Motor boat engine manufacturers have argued, often in the context of litigation arising from a propeller injury, that propeller guards themselves can be as or more hazardous than an unguarded propeller, replacing the risk of lacerative injuries from the propeller with that if severe blunt trauma from the guard. Propeller guarding advocates have argued that guards will eliminate serious injuries at low to moderate boat speeds and that serious or fatal injuries, due to contact with the guard, will only occur at relatively high boat speed. Since at least 1980, a number of tests have been conducted to assess these arguments.

Richard Snyder "Sausage Tests"

In 1980, Richard Snyder, at Mercury Marine, performed a series of tests intended to assess the ability of a propeller guard to protect or to harm a person in the water. He used a 2-foot-long by 3-inch-diameter summer sausage packed in an animal skin casing to simulate a human limb. The sausage was skewered on the end of a 1/2-inch wooden dowel and held in a controllable horizontal position under the water. An 18-foot V-bottom boat powered by a 140 hp engine ran over sausages at 4 mph, 7 mph, 12 mph, 20 mph, and 25 mph. First the test was performed without a guard and then the propeller was covered with a cage guard and, finally, with a ring guard. [Snyder, 1980] Snyder found that at 7 mph, the sausage was dragged off; at 12 mph, the sausage buckled, the skin split and was severed; at 20 mph, the sausage was severed, "whether struck by the strut, the skeg, the wires of the cage guard or the ring on the ring guard."[25] [Snyder, 1980] In a letter to the U.S. Coast Guard detailing these results, Snyder concluded that "cages around propellers have a place, but it is strictly in low speed, below 10 mph applications . . . " Likening propeller guards or water jet propulsion to surrounding cars with a "giant, ground hugging, soft cushion" or with requiring cages for airplane props, he commented that "all of these ideas would save lives but would be utterly impractical, very expensive, and quite unpopular." [Snyder, 1980]

---

[25] The "strut" is the bracket supporting a ship's propeller. [Noel, 1988] The "skeg" is a protecting part that projects below the propeller of an outboard motor.

Lawrence Thibault Head Impact Tests

In a series of tests intended for attorney use in litigation, Lawrence Thibault, a University of Pennsylvania biomechanical engineer, analyzed the potential protective effect of a shroud or duct-shaped propeller guard. He initially determined that most victims of propeller injuries are struck by the blades from the side, relative to the forward motion of the boat, so a ring-shaped guard could prevent most contact with the propeller.[26]

Recognizing that strikes to the head are the most devastating of propeller injuries, Thibault struck the leading edge of the propeller guard against an instrumented Part 572[27] dummy head form (used routinely for automobile crash testing) to measure the forces sustained. The impact speeds ranged from 10 to 28 mph. He also tested a series of metal specimens described as "candidates for a crushable leading edge on such a shroud/duct design." Thibault concluded that "the results of this testing clearly demonstrate that the propeller guard can substantially

---

[26] This conclusion is bolstered by the hydrodynamic analyses of other experts. For example, Hill and Reed both reasoned that the lower end and skeg of a boat operate to inhibit frontal contact with the propeller for nearly all persons in the water. In addition, the outflow from the propeller against a body in the water and the forward progress of the boat away from that body make contact with the rear of the propeller unlikely. This forward motion of the boat also tends to push surrounding water to the side and would increase the potential for contact with the propeller from the side rather than from the front or back. [Hill, 1987; Reed, 1987]

[27] The characteristics of this instrumented dummy are specified as part of the federal motor vehicle safety standards at 49 C.F.R. 572 (1991).

reduce or eliminate injury over the range of impact speeds. The results further demonstrate what has been known by the transportation industry for decades and that is the efficacy of energy management systems with regard to structural design and impact injury prevention." [Thibault, 1987]

Ben Hogan Diver Tests

In 1988, Alabama attorney R. Ben Hogan commissioned a test, supervised by Thibault, to determine if a guard alone would produce injuries, as Snyder and others had suggested. [Snyder, 1980] The test, which is unique in using a human subject, called for a stunt diver to be struck by boats equipped with Chadwell cage-type propeller guards. The trials employed a pontoon boat driven by an 88 hp Johnson engine manufactured by OMC and fishing boat equipped with a 90 hp Tohatsu engine. The surface of the propeller guard was coated with colored dye in order to confirm that the divers did in fact contact the guard and to indicate where the contacts occurred. Thibault had testified in court cases that it would take speeds of 18 to 20 mph to break human bone [Beech, 1989], so the tests were planned for lesser speeds. At speeds up to 12 mph, the diver struck by the propeller guard (as evidenced by the dye marker on his wet suit) sustained no injuries, neither lacerative nor blunt. The guards were not tested at speeds greater than 12 mph. [Hogan, 1989(b)]

University of Tennessee Cadaver Tests

In an effort to refine their investigation into the potential for injury from contact with a propeller guard, in 1990 Mercury Marine and OMC contracted with researchers at the University of Tennessee to conduct tests "to determine the effectiveness of a particular boat motor cage-type propeller guard as a safety device to protect a swimmer's leg." [Kress, 1991] The test protocol called for seven embalmed human cadaver legs to be struck at various speeds by a motor boat engine equipped with a cage-type propeller guard. The researchers sought to determine the threshold speed above which an impact sustained by human legs would result in complete loss of limb function.

Propeller Guard Feasibility Issues

1. Hydrodynamic Performance
   - Boat handling
   - Visibility
   - Top speed
   - Fuel efficiency
   - Guard durability
   - Acceptable performance trade-offs
2. Protective Effect
   - Variety of injury scenarios
   - Maximum boat speed at which a guard will protect people
   - Lacerative versus blunt trauma
   - Potential for limb entrapment
   - Increased underwater area with guard
3. Coast and Consumer Acceptance
   - Reduce need for replacement propellers
   - Marketing surveys not yet conducted
   - Potential for consumer removal of guard

The cadaver legs were sectioned at mid-thigh and attached to a dummy torso. They were then held horizontally below the water line of a test tank and struck by a propeller guard engine at speeds of 21 mph, 17.2 mph, 13.6 mph and 10.4 mph. In order to assess the level of injury sustained, the legs were X-rayed and dissected. The leg struck at 10.4 mph sustained a transverse fracture from which, the researchers judged, a full recovery would be likely. The legs struck at speeds greater than 10.4 mph sustained comminuted fractures which the researchers judged serious enough to result in loss of leg function. No objective criteria for the determination of probable limb function were specified; furthermore, no "blinded" evaluation of the X-rays was performed by outside experts unaware of the study's purpose.

None of the cadaver legs sustained extensive soft tissue or neurologic damage. Most of the cadavers, however, had been embalmed for several years prior to their use in this study, causing the tissue surrounding the bone to become more resistant to damage. The average cortex thickness of the embalmed legs was determined by the researchers to be comparable to that of a group of "fresher" embalmed legs, leading them to the conclusion

that bone strength was not adversely affected by the long-term storage of the test legs. No discussion, however, of the effect that relatively rigid soft tissue might have on more direct transfer of impact energy to the bone was reported.

The average age of the cadavers used was 75 years. This is noteworthy because the likelihood of fracture, given the same force, increases dramatically with age, due to osteoporosis and other changes in bone composition that begin at about age 45 and accelerate thereafter. [Consensus Conference, 1984]

The authors concluded that for their specific test conditions, the "prop-guard cage is not an effective device in preventing severe leg injury at boat velocities greater than or equal to about 13 mph", [Kress, 1991] but they acknowledged that "it would be desirable for future tests to utilize a cadaver population that is somewhat younger to relate better to real-life situations" and that "additional tests are needed to provide a statistically justifiable technical basis" for their results. [Kress, 1991]

Conclusion

The question of the hydrodynamic feasibility and protective effect of propeller guards continues to be debated as new information is developed. Although there is little agreement about the hydrodynamic feasibility of guards, there does appear to be some consensus that a cage-type guard would prevent most serious limb injuries

at impact speeds at least up to 10 to 12 mph. [Thibault, 1987; Hogan, 1989; Kress, 1990][28]

Unfortunately, both opponents and proponents of guards have primarily developed this information in the context of personal injury litigation. There is a need for additional non-litigation-related research by government and academic or other independent institutions to develop interventions intended to prevent propeller injuries. In addition, marine propulsion manufacturers, who profit from the sale of marine engines, have the obligation and the resources to appropriately investigate ways to prevent or ameliorate the injuries their products cause.

Part Three

Propeller Injury Policies, Legislation and Litigation

Introduction

As with efforts to prevent other product-related injuries, propeller injuries and the feasibility of guarding technology have been addressed in a number of different forums. These potential avenues to reduce or eliminate

---

[28] But see discussion accompanying Snyder "sausage test" (suggesting the potential for serious injury at lower speeds) [Snyder, 1980] and discussion accompanying Thibault head impact tests (suggesting that guards can prevent fatal head injuries at much higher speeds). [Thibault, 1987]. Donald Huelke of the University of Michigan has also reported that in tests he conducted for OMC several years ago, test dummies sustained presumably fatal head injuries in some trials conducted at speeds below 10 mph. Test protocols and results were not available. [Huelke, 1992]

propeller injuries have included federal or state government rulemaking to mandate propeller guards, voluntary manufacturer provision of guards as original equipment and personal injury litigation designed to compensate victims of unguarded propellers while providing manufacturers a monetary incentive to make their products safer.

Unfortunately these efforts have not successfully met the propeller injury problem. Despite a decade-long series of internal analyses, the federal government has refused to require propeller guards, and state initiatives to combat propeller injuries remain at a preliminary level. Outboard motor manufacturers have failed to provide guards, choosing instead to defend this position in court. Litigation has not forced manufacturers to change their position, as OMC and Mercury Marine have prevailed in the majority of these lawsuits.

United States Coast Guard

In the United States, the Coast Guard is responsible for monitoring and providing statistical reports of recreational boating injuries. In addition, the Coast Guard has been delegated authority under the Federal Boat Safety Act of 1971 to prescribe regulations "requiring the installation, carrying, or use of associated equipment . . . on recreational vessels subject to this chapter, and prohibiting the installation, carrying or use of associated equipment that does not conform with safety standards established under this section." [46 U.S.C.A. 4302(a)(2) (West Sp.Pamph. 1991)] Therefore, if the Coast Guard were to conclude that propeller guards are needed to

mitigate a serious boating hazard, it has the authority to require them.[29]

To date, the Coast guard has not promulgated any regulations requiring propeller guards, nor is any rulemaking in progress. Since the late 1970s, however, the Coast Guard has conducted several analyses of the incidence, severity and potential for prevention of propeller injuries.

In 1979, Coast Guard statistician Ken Freund analyzed all propeller injury incidents coded in 1978 as "struck by boat or propeller." [Freund, 1979] Freund looked at variables such as operator age and experience, speed, and direction of impact in order to examine the effectiveness of several proposed means of eliminating or reducing propeller injuries. After determining that start-in-gear protection[30] would have prevented none of the 52 fatalities and only 3 of the 171 injuries he had identified, Freud concluded that "the verdict on propeller guards is just the opposite. It is projected that 39 of the fatalities [75

---

[29] Before promulgating any regulations under the Act, the Coast Guard is required to consult with the National Boating Safety Advisory council (NBSAC) [46 U.S.C.A. § 4302(c) (West Sp. Pamph. 1991)], whose 21 members are appointed by the Secretary of Transportation. The Act requires that council membership consist of seven state boating safety officials, seven representatives of recreational vessel or associated equipment manufacturers, and seven representatives of the general public (at least five of whom must be members of national recreational boating organizations). [46 U.S.C. § 13110]

[30] "Start-in-gear" protection prevents the propeller blades from spinning when an outboard motor is first started by keeping the engine in "neutral" rather than "in gear."

percent] could have been prevented, 67 of the injuries could have been prevented and 93 others could have been less severe [total 94 percent]," using a cage-type propeller guard. [Freund, 1979] He also stated that "for the propeller guard approach, benefits would have to be measured for each design type, and the extent of adverse impact on boat performance assessed." Finally, Freund recommended that "in-house or outside research and development be initiated to develop potential solutions to propeller accidents . . . [T]he magnitude of this problem requires immediate attention and action." [Freund, 1979]

In a November 20, 1979 internal memo, A.J. Marmo of the Coast Guard's Policy Planning and Information Analysis Staff attempted to limit the scope of several of Freund's conclusions regarding propeller guards. He stressed the subjective character of Freund's determination that a propeller guard would have prevented an injury or fatality; in fact, he argued that in some cases the probability that an injury would have been prevented might have been as low as 25 percent. Marmo also explained that the propeller guard was assumed to have no sharp edges and would have included a rubber covering surrounding the metal network. The memo does not describe any proposed follow-up to Freund's report or pending action on its recommendations.

In 1984, statistician Gary Traub conducted another Coast Guard analysis of its propeller injury data (this time using 1983 boating accident reports). Although Traub found that the estimates of the ability of propeller guards to prevent injuries and fatalities had fallen slightly since Freund's 1979 study, he concluded that "the percentage of victims who would be helped by the guard

is still very high at eighty-six percent." [Traub, 1984] This represented 30 of 33 injuries and 6 of 9 fatalities whose adverse outcome would have been eliminated or made less severe. Again, as with the Freund report, there is no evidence in the Traub study or elsewhere of a meaningful Coast Guard response to this information.

In March 1987, Edward Purcell and Walter Lincoln, with the U.S. Coast Guard Research and Development Center, submitted a report entitled "Boat and Propeller Impact Injuries and Fatalities." The report is described as completing a Coast Guard project, begun in 1985, intended to define the extent of the propeller injury problem and to evaluate available countermeasures. The authors recognized that propeller guards were being used in certain low speed applications, but noted that "their use on higher speed craft raises questions of efficiency and comparative safety." [Purcell, 1987]

Purcell and Lincoln concluded that existing data did not allow an accurate determination of the true magnitude of the propeller injury problem. They recommended a systematic analysis of propeller injuries and countermeasures, including: 1) active data collection via a random hospital sample; 2) biomechanical analysis of the effects of underwater impact on human tissue, considering variations in body tissue, blade tip speed, and impact angle; 3) a program to encourage private sector development and refinement of countermeasures; and 4) use of the biomechanical and mechanical data to rate the protective effect of the various proffered countermeasures. [Purcell, 1987]

The official Coast Guard response to the Purcell and Lincoln report stated that "inadequacy of existing data does not justify immediate attention to evaluation of alternative design concepts with the intent of identifying engineering solutions. Higher quality data must be collected to define the extent of the problem. Future analysis of an improved accident data base may justify later initiation of a safety device development program." In addition, the Coast Guard returned to its emphasis on boating safety education, concluding that "[p]resent Coast Guard efforts may be better expended on safety education rather than device development." [Powell, 1987]

Thus, Freund and Traub recognized the incompleteness of existing propeller injury data but concluded that they were nevertheless sufficient to justify the need for propeller guards. Purcell and Lincoln, however, reasoned that no conclusions could be drawn until adequate data had been collected and urged a program of active data collection. The Coast Guard did not effectively implement either set of recommendations.

In May 1988, nearly ten years after the preparation of Freund's propeller injury report, the U.S. Coast Guard asked the National Boating Safety Advisory Committee (NBSAC)[31] to form a subcommittee to examine the issue of propeller injuries and the feasibility of propeller guarding. The subcommittee was instructed to assess the magnitude of the problem and the feasiblity of and need for propeller guards. It had in its possession much of the

---

[31] See note 29, supra.

material described in this monograph (produced prior to release of its report).

On November 7, 1989, the propeller guard subcommittee issued its report, recommending that no regulatory action be taken to require propeller guards. The subcommittee listed a number of reasons for its decision; but it is difficult to analyze the subcommittee's rationale since it did not cite the specific sources for many of its conclusions and no official meeting transcripts were prepared.

The subcommittee recognized the incompleteness of existing data for propeller injuries (repeating the Coast Guard's usual estimate of only five to ten percent reporting of non-fatal injuries), but asserted that "available sources can be utilized collectively to give an accurate portrayal of the significance, frequently, and relative magnitude of underwater impacts to other causes of boating accidents in particular and accidents in general." [NBSAC propeller guard subcommittee, 1989] The subcommittee apparently relied heavily upon information presented to it by Robert Taylor of Failure Analysis Associates (a consulting firm which has performed work on behalf of manufacturers in product-related injury litigation). Taylor compared fatalities per million exposure hours for various activities and found that recreational boating ranked near the bottom of the list (with "struck by boat or propeller" fatalities constituting only about five percent of the 1976-1981 recreational boating fatality total). Taylor's propeller fatality data apparently were derived primarily from the Coast Guard's existing data

set;[32] the source of his 1981 exposure data is not specified. Taylor also presented non-fatal propeller injury data [Taylor, 1992], but these were not specifically discussed by the subcommittee in its report. [NBSAC propeller guard subcommittee, 1989]

Among its recommendations, the subcommittee urged the Coast Guard to improve its accident reporting and analysis to "develop a complete and comprehensive data base on underwater impact accidents." Conversely, without discussing the information available in the Coast Guard's own analyses prepared by Freund, Traub and Purcell, or the information contained in the medical literature, such as Price and Moorefield's 1987 study[33], the subcommittee concluded, "[T]here is no indication that any change in reporting would reflect significant changes in the relative position or percentage of injuries/fatalities due to underwater impacts. Therefore, propeller guarding . . . could have only a negligible impact on improving boating safety." [NBSAC propeller guard subcommittee, 1989]

On the subject of the hydrodynamic performance of propeller guards, the subcommittee report stated that guards in current design would unacceptably decrease the top speed and correspondingly increase fuel consumption on boats so equipped. [NBSAC propeller guard subcommittee, 1989] Apparently the subcommittee based this conclusion, at least in part, on information presented in an oral report by "an engineer for one of the engine

---

[32] See pages 3-12, supra.

[33] See Part One, page 11, supra.

manufacturers" (the specifics of the description and the list of presenters suggests that the source of this information was Richard Snyder of Mercury Marine). [NBSAC propeller guard subcommittee, 1989] The reports prepared by Taggart, Reed and Hill[34] suggesting improved handling characteristics with minimal speed and fuel economy diminishment were in the subcommittee's possession, but the data and conclusions contained in these reports were not discussed, beyond merely noting that proponents of guards believe them to be hydrodynamically acceptable in current or anticipated design. The report also did not describe what, in the subcommittee's view, might constitute acceptable diminishment of speed or fuel economy in exchange for human protection. The OMC propeller guard patent and reports related to OMC projects 441 and 443 apparently never were furnished to the subcommittee. (They do not appear among the list of materials reviewed by the subcommittee.)

In addition, the subcommittee concluded that a ring-shaped guard would not provide adequate protection against impacts from the front or back and could result in limb entrapment. [NBSAC propeller guard subcommittee, 1989]. A cage-type guard (reducing or eliminating the risk of entrapment) would not offer substantial protection above 10 mph, the subcommittee determined. Contact with any propeller guard at speeds above 10 mph, it reported, would replace laceration injuries with devastating, possibly fatal, blunt trauma. Blunt contact with an underwater appendage, the subcommittee said, produces more serious injury than the "series of evenly spaced cuts

---

[34] See pages 17, 20-21, supra.

which are relatively easier to repair surgically" associated with unguarded propeller blades. [NBSAC propeller guard subcommittee, 1989]. Again, the data supporting these conclusions, rather than the contrary information described in the medical literature[35] (detailing the devastating character of many propeller injuries) and in the reports prepared by Thibault and Hogan[36] (examining the protective effect of guards at higher speeds), are not adequately presented.

The subcommittee also expressed concern that use of a propeller guard would increase the likelihood of underwater contact by "substantially" increasing the underwater profile of the engine. The report notes that "opponents [of guards] have stressed that the frontal impact area would be increased by three times by attaching the guard." The supporting data for this calculation are not included, and tested guard configurations have shown it to be inaccurate.

In its ultimate decision not to recommend propeller guards, the subcommittee appears to have adopted the conclusion that "the objective of simultaneously protecting the propeller from damage, protecting personnel [in the water] and making no material sacrifice of speed involve[s] irreconcilable physical laws and an insoluble manufacturing dilemma." [NBSAC propeller guard subcommittee, 1989] Underlying this conclusion is the subcommittee's assumption that "by definition, a guard must both diminish a hazard and leave the object capable of

---

[35] See pages 2-3, supra.

[36] See pages 22-23, supra.

normal function, at a cost which is reasonable in proportion to the extent of the hazard. . . . Above all, it is fundamental that a guard should not create a condition which leads to a new or worse hazard." [NBSAC propeller guard subcommittee, 1989]

Certainly no safety device is acceptable if it causes *more severe* injuries than those it eliminates. However, the subcommittee's view that a safety guard must create no *new* hazards needlessly excludes propeller guards or any safety device which can prevent serious injuries while perhaps creating lesser ones. The lap-shoulder belt system in automobiles provides a good model for this sort of beneficial trade-off. In exchange for preventing ejections and reducing the risk of violent, injurious contact with the car's interior structure, lap-shoulder belt wearers may suffer abrasions, contusions or other minor to moderate injuries as a result of being restrained by the belt. While lap-shoulder belts can create these new, lesser injuries, they are critically important in preventing far more serious, even fatal, injuries.

On February 1, 1990, the Coast Guard, relying upon the subcommittee's recommendation, decided not to require propeller guards. [Nelson, 1990]

The propeller injury issue, however, has not been definitively settled by the subcommittee's recommendation. At the urging of consumer advocacy groups, as part of the 1991 Department of Transportation appropriations bill, Congress allocated $150,000 to the Coast Guard to develop improved data for the incidence and severity of propeller injuries. That effort is being conducted under the aegis of the Centers for Disease Control, with the first

report expected in 1992. [House Rep. No. 584 101st Cong. 2d Sess. 37 (1990)].

In the meantime, the Coast Guard annual report continues to aggregate propeller injuries in the "struck by boat or propeller" category and to report accident types by the first event in any accident scenario. The Coast Guard has proposed no changes in its data collection or reporting methods, nor is it currently conducting any additional activities specifically addressing propeller injuries or guards.

Manufacturers

In the United States, OMC and Mercury Marine together dominate the recreational boating propulsion market. In 1988, OMC reported net earnings of more than $70 million, while Mercury Marine earned more than $280 million. [OMC, 1989; Brunswick, 1989] Neither company has invested its vast resources in a committed and well-funded research and development plan to monitor the deaths and injuries its engines cause, or to design and test effective countermeasures.[37] By contrast, during a recent propeller injury trial, Don Kueny, the chief engineer for outboard design at OMC, described his company's efforts to design a single 150 hp V-6 engine. OMC committed the talents of five engineers (presumably with considerable support staff) for approximately three years

[37] In fact, much of the manufacturer propeller guard testing has been "litigation testing" in an effort to assess privately manufactured guards, rather than true research and development work intended to design improved guards.

with a budget of $2-3 million. When asked, "[H]as OMC ever had a research and development program to try to develop a propeller guard to protect people?" Kueny responded, "The answer is 'no.' " [*Elliott*, 1989] Given this failure, it is not surprising that neither company offers for sale (as standard or optional equipment) a propeller guard intended to protect people in the water.[38] In fact, no marine engine manufacturer[39] has ever marketed such a propeller guard.[40]

Several possible explanations for engine manufacturers' refusal to invest in the development of propeller guard technology have been advanced. Richard Snyder, principal engineer for product evaluation at Mercury Marine, has testified in court and argued to the Coast Guard that "the industry believed there was a universal understanding that marine propellers were open and obvious dangers not even requiring warnings. Further, the industry thought it was universally accepted that any guarding dervice set in motion against the object trying to be protected no longer could be considered a guarding device." [Snyder, 1988] Snyder asserted that a propeller guard design which did not unduly affect the hydrodynamic characteristics of the boat and also protected

[38] OMC does sell a guard designed for boats operating at 15 mph or less in order to protect the propeller from damage.

[39] Volvo Penta, a Swedish manufacturer, has begun a limited project to develop a propeller guard which would protect people, but none has yet been offered for sale.

[40] Although several private companies have offered guards as after-market accessories, some engine manufacturers have taken the position that engine warranties may be in jeopardy if such devices are installed.

persons in the water would "defy physics." [Snyder, 1988]

It has also been argued that if good propeller guards could be designed and were provided as original equipment with a marine engine, consumers would simply remove the guards, resulting in a dangerously overpowered boat. This argument is difficult to evaluate since manufacturers have not yet provided an original equipment guard, nor have they sought engineering or educational solutions to this potential problem.

Since propeller guards to protect people in the water would offer at least some protection against propeller damage caused by underwater objects, some plaintiff's attorneys have argued that manufacturers' failure to develop and market propeller guards stems partly from a desire to protect their lucrative market for replacement propellers. For example, documents produced pursuant to litigation suggest that in 1989 OMC sold approximately 50 propellers for every engine it manufactured. [OMC, 1990] On the other hand, Snyder has reported that Mercury sells only 1.6 propellers for every new engine and argued that if propeller guards were feasible, they would themselves be a lucrative source of revenue for a manufacturer. [Snyder, 1988]

It may also be that manufacturers view boat speed as a marketing tool threatened by propeller guards. Certainly, boat and engine advertisements frequently employ speed as a selling tactic. Any device which reduces the top speed of a boat, it might be argued, is contrary to that image of power fostered by engine manufacturers and is

potentially bad for business. The validity of this argument is also difficult to assess; the author could find no manufacturer discussion of what might represent acceptable reduction of speed in exchange for human protection.

Finally, the potential liability facing engine manufacturers should they acknowledge the feasibility of propeller guards may also be a motivating factor.

Litigation

Given the Coast Guard's refusal thus far to mandate propeller guards and the marine engine manufacturers' unwillingness to introduce them voluntarily, the primary forum in which issues of propeller guard feasibility and desirability are addressed has become the courts. Since the 1970s, more than three dozen lawsuits have been filed against marine engine manufacturers, seeking compensation for injuries allegedly caused by unguarded propellers. [Hogan, 1989(a)] Little of the information presented during these legal proceedings is readily available, however, for several reasons. Some of the lawsuits have been settled out of court for undisclosed amounts of money. Others are trial level decisions for which there is no written judicial opinion, so that any information may be limited to the prevailing litigant's descriptions or to the trial transcripts.

Several cases for which some information is available will be briefly summarized here to illustrate the character of the arguments presented as well as the potential for personal injury litigation as a means to prevent future propeller injuries.

Fitzpatrick v. Outboard Marine Corporation

On August 10, 1980, 16-year-old Kevin Fitzpatrick and his 17-year-old sister, Lisa, were playing in the water at Patcong Creek Cove near Ocean City, New Jersey. While swimming approximately 15 to 20 feet from shore, Kevin was struck in the head by the propeller of a 70 horsepower Evinrude engine (made by OMC) powering a Boston Whaler boat travelling at approximately 20 to 30 mph. Later that day, Fitzpatrick was pronounced dead at Shore Memorial Hospital, having suffered massive head trauma and loss of blood. [Bolden, 1985]

In July 1982, Fitzpatrick's family brought suit in Pennsylvania state court against the operator of the boat for his negligent conduct and against OMC for its failure to provide a propeller guard to prevent or reduce the injuries which Kevin had sustained. [*Fitzpatrick v. OMC*, No. 82-9635 (Ct of Common Pleas, Delaware County, PA, January 28, 1985)] After settling with the boat operator, trial began in January 1985 against OMC.

The case against OMC was based on theories of negligence and strict liability. At trial, the plaintiff was required to prove that propeller guards were feasible at a reasonable cost and that a guard would have saved Kevin Fitzpatrick's life. Plaintiff presented evidence of the feasibility and protective effect of guards, relying principally upon the analyses of Robert Taggart and Lawrence Thibault.[41] Taggart testified at trial that propeller guards had been technologically feasible for many years prior to

---

[41] See pages 17-18, 22, supra.

Fitzpatrick's injury. Thibault presented the results of his propeller guard head impact testing and asserted that, had a guard been provided by OMC for its engine, Fitzpatrick would have survived the impact, likely sustaining a scalp laceration, skull fracture and concussion.

After its deliberations, the jury found that OMC was negligent and that its product was defectively designed. They established damages of approximately $1.1 million, with 60 percent of the total liability apportioned to OMC and the remainder to the operator of the boat. [Bolden, 1985]

OMC has appealed the verdict. Post-trial motions were decided in Fitzpatrick's favor by the court and the appellate court decision is expected in 1992.

Elliott v. Mercury Marine

On the night of July 24, 1982, 14-year-old Ashley Elliott was celebrating her initiation into the "Subdeb" social club at school by taking a midnight dip with several girl friends in the Tennessee River near Sheffield, Alabama. Several young men watching the initiation ceremony from a nearby boat decided to join the group. One of the boys maneuvered his Sport-Craft boat equipped with a 165-hp Mercruiser engine close to the girls. As the boat swept through the water where Elliott was swimming, the propeller slashed her right leg and buttock, severing nerves. Elliott was rendered functionally impaired and disfigured, despite numerous surgeries. [*Elliott*, 1989]

Elliott filed suit against both Mercury Marine and Sport-Craft. In the first trial, begun August 16, 1988, in federal district court in Birmingham, Alabama, a mistrial was declared when the jury was unable to reach a verdict. In the retrial, begun January 9, 1989, Sport-Craft was released as a defendant and the focus was tightened on Mercury Marine since, as a Sport-Craft representative had testified (and as Mercury recognized), boat builders have relied on engine manufacturers for expertise in propeller guarding. [Hogan, 1989a]

The primary factual issues at trial were the hydrodynamic acceptability and protective effect of propeller guards. The trial pitted manufacturers and their battery of experts against what Elliott's attorneys presented as a feasible guard design, exemplified by the Chadwell guard.[42] Prior to trial, Brian Chadwell had placed a prototype of his guard on the boat involved in Elliott's accident and performed speed and handling tests. These were shown to the jury on film, along with demonstrations of the guarded boat pulling two water skiers and of defense attorneys and experts operating the boat. Under questioning, experts for the plaintiff admitted that the Chadwell guards were only a first step, albeit an important one, in the development of a refined propeller guard, but testified that Mercury had all the information it needed to develop guards appropriate for pleasure boats. According to testimony by Arthur Reed, a naval architect and marine engineer who authored a 1987 study on

[42] See page 20-21, supra.

guards,[43] it would have required an investment by Mercury Marine of only $1.5 million to make feasible guard designs ready for the marketplace.

Mercury Marine did not contest that a Chadwell-type ring guard could have been manufactured 15 years earlier. They did argue that the Chadwell guard was not hydrodynamically acceptable and did not offer superior protection to an unguarded propeller. Mercury's experts, led by Richard Snyder, additionally testified that they had never seen a feasible design; Snyder doubted that there would ever be a consumer market for the devices, due to the (in his view) inevitably decreased top speed, reduced fuel efficiency, and impaired handling of the boat with a propeller guard.[44] [*Elliott*, 1989] Testimony and evidence presented at trial, however, revealed that no marketing and little research had been done to design, develop or ascertain potential consumer acceptance of a propeller guard intended to protect people in the water. [*Elliott*, 1989]

As to the ability of a propeller guard to offer protection, Mercury argued that the addition of a propeller guard, by substantially increasing the underwater profile of the boat/engine combination, enhanced the risk of being struck, and that getting hit by a propeller guard might cause injuries more severe than those associated with an unguarded propeller. Plaintiff's witness, Lawrence Thibault, presented his dummy head impact tests,

[43] See pages 20-21, supra.

[44] In fact, Snyder testified that "safety" is one reason that Mercury does not market propeller guards.

demonstrating the survivable nature of even relatively high speed contact with a propeller guard. After reviewing Alabama marine accident reports, he also testified that 80 to 90 percent of the propeller injury incidents in Alabama could have been mitigated had a ring guard like Brian Chadwell's been used. [Hogan, 1989]

The jury's deliberation in the *Elliott* case centered on Mercury's failure to conduct the necessary research and development to design a feasible propeller guard. "If propeller guards were feasible, then Mercury was at least negligent, if not grossly negligent, in failing to conduct research and development on them and place them on their products for the past 15 years," argued Elliott's attorney, Ben Hogan. After seven trial days, the jury reached a decision, awarding Elliott $1.5 million in compensatory damages and $3 million in punitive damages, apparently figuring two times the $1.5 million Reed had estimated it would take to make guard designs ready for manufacture. [Hogan, 1989(a)] Mercury immediately appealed the decision.

On June 25, 1990, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court's decision and set aside the jury verdict, *Elliot* [sic] *v. Brunswick Corporation*, 903 F.2d 1505 (11th Cir. 1990).[45] Applying the Alabama Extended Manufacturers Liability Doctrine

[45] Federal jurisdiction for the *Elliott* case was based upon the diversity of citizenship of the adverse parties. When a federal court hears a case under its diversity jurisdiction, it must apply the law of the forum state, here Alabama. Recognizing that the highest court within the state of Alabama had not yet had an opportunity to address the precise issues raised by the *Elliott* case, the Court of Appeals looked to the

(AEMLD) to the facts of the *Elliott* case (as had the trial court), the appellate court determined that the plaintiff must prove that an unguarded propeller was defective in that it "does not meet the reasonable expectations of an ordinary consumer as to its safety." [903 F.2d 1505, 1507 quoting *Casrell v. Altec Industries, Inc.*, 335 So.2d 128, 133 (Ala. 1976)] Further, it held that the plaintiff must demonstrate that a "safer, practical, alternative design was available to the manufacturer at the time it manufactured the [product]." [903 F.2d 1505, 1507 quoting *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1191 (Ala. 1976)]

The trial court in *Elliott* had determined that whether an unguarded propeller met the "consumer expectation" test for the existence of a defect was appropriately a question for the jury to answer (as are most factual questions, after the plaintiff has met an initial burden of coming forward with some evidence). The reviewing court held, however, that the trial court had erred in allowing the jury to make this determination. Where the involved parties "contemplated the nature of the defect at the time of the accident," the court (not the jury) should assess the plaintiff's allegations that a product is defective. [903 F.2d at 1507] Comparing boat propellers to knives, saws and fishhooks, the appellate court concluded that, as a matter of law, "the dangers inherent in Mercury's product should have been apparent to, or within the contemplation of Elliott," so that the

body of Alabama law in an effort to match its own ruling with what it believed the Alabama Supreme Court would conclude.

unguarded propeller was not defective within its interpretation of Alabama law.[46]

Although this determination alone would have been enough to reverse the lower court decision, the appellate court went on to analyze the evidence for the availability of a safer alternative design, the second element of plaintiff's case. When an appellate court is asked to set aside a jury's factual conclusions, the standard of review generally requires the reviewing court to determine that no reasonable jury could have reached the conclusions at issue. The court must avoid merely substituting its judgment for the judgment of the jury, which had the opportunity to hear the witnesses' live testimony and assess their credibility in person. In *Elliott*, the Court of Appeals determined that the plaintiff's evidence of current propeller guard designs and its expert testimony that Mercury could have developed a marketable propeller guard through the commitment of appropriate research and development resources did not demonstrate the existence of a safer alternative design. [903 F.2d at 1509] It discussed the evidence presented on both sides and apparently determined that a reasonable jury could not have found Elliott to have met her burden (although the court's opinion does not state this explicitly and reads more like a *de novo* review by the court of the trial evidence).

---

[46] Of course, from a more practical perspective, even if Ashley Elliott herself "contemplated" the "defective" nature of the unguarded propeller, there was little she could have done to avoid her injuries.

On May 3, 1991, the Supreme Court of Alabama confirmed the Court of Appeals' reading of Alabama law in *Beech v. Outboard Marine Corporation*, 584 So.2d 447 (Ala. 1991). Again interpreting the AEMLD, the court affirmed a summary judgment by holding that an unguarded propeller was not dangerous beyond the expectations of an ordinary consumer. Further, the court agreed that a safety device which arguably creates other dangers is not a "safer alternative design" within the meaning of Alabama products liability law. Where the plaintiff's allegation is only that the defendant *could* have developed a safer alternative design, the court held that a *prima facie* case is not established under the AEMLD.[47]

Preemption Cases

A pair of recent cases may present an even more disturbing set of legal obstacles for courtroom advocates of propeller guards. On August 7, 1988, Scott Mowery was riding in an inflatable raft on Lake Erie when he was struck by the propeller of a Mercruiser engine powering a Delta Sport DC 215 boat. Mowery was seriously injured and on July 10, 1990 commenced a products liability action against Mercury Marine for its failure to provide a propeller guard. (He also sued Larson Boats, the powerboat manufacturer.) Before any trial could begin, Mercury filed a motion to dismiss the lawsuit, arguing that the U.S. District Court in Ohio lacked subject matter jurisdiction because Mowery's claim was preempted by a federal law, the Federal Boat Safety Act of 1971 (FBSA). [46

---

[47] See also, *Veal v. Teleflex Inc.*, 586 So.2d 188 (Ala. 1991).

U.S.C.A. 4301, *et seq.* (West Sp. Pamph. 1991)] Under the FBSA, Congress delegated its rulemaking authority in the area of recreational boating equipment safety standards to the Department of Transportation. The powers and duties conferred by the FBSA were subsequently delegated to the Coast Guard. The FBSA contains a "preemption clause" which prohibits a state from enacting any boating equipment safety standard not identical to the federal standard.[48] The Act also includes a "savings clause" which provides that compliance with any regulation promulgated under the FBSA will not relieve a manufacturer from liability at common law. [46 U.S.C.A. 4311(g) (West Sp. Pamph. 1991)] Mercury Marine asserted that the Coast Guard had considered the issue of propeller guards and found that no regulation should be promulgated under the FBSA. Mercury Marine argued that this represented a decision not to regulate in this specific area and carried the same preemptive force as a more affirmative safety standard.

In *Mowery v. Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991), the court agreed. It held that Scott Mowery's claim was preempted by the FBSA and granted Mercury Marine's motion to dismiss the lawsuit. Citing the propeller guard subcommittee's report to the NBSAC and the Coast Guard's acquiescence in its recommendation not to regulate, the court determined that to allow the potential

---

[48] The primary rationale for inclusion of a preemption clause in a statute such as the FBSA is to prevent the 50 states from enacting a patchwork of different regulations, making it difficult and inefficient for manufacturers to conform their products to so many varying standards.

imposition of damages under state common law would be "tantamount to recognition of a state requirement that [propeller guards] be installed – an act explicitly forbidden by the FBSA's preemption clause." [773 F. Supp. at 1016]

The court also held that the FBSA's "savings clause" would not allow Mowery's claim to go forward. It determined that the clause only applied to claims alleging a defect in a piece of safety equipment actually installed, whether or not it was mandated under the FBSA. Under this line of reasoning, a manufacturer could be held liable only if it chose to install a dangerous and defective propeller guard. But if manufacturers never provide propeller guards (and the Coast Guard does not mandate them), then no liability action predicated on the failure would ever be allowed to go forward. Obviously, this provides a strong disincentive for manufacturers to provide any safety device not specifically required by the Coast Guard.

Just two months later, a second federal district court employed the same reasoning as the *Mowery* court in *Shields v. Outboard Marine Corporation*, 776 F.Supp. 1579 (M.D. Ga. 1991). Plaintiff Sheila Shields was a passenger in a recreational boat in Florida. The boat hit an underwater object and Shields was thrown overboard. She was struck and injured by the boat engine's propeller, manufactured by OMC. As had Mercury Marine, OMC argued that Shield's claim was preempted by the Coast Guard's affirmative decision not to regulate under the Federal Boat Safety Act, and asked the court to dismiss the lawsuit. The court granted OMC's request, noting that the Coast Guard's action implied "a decision that this area is

best left unregulated, which has as much preemptive effect as a decision to regulate." [776 F.Supp. at 1581] The court was similarly unmoved by Shields' argument that the FBSA's savings clause preserved her case. As an alternative rationale for its decision to dismiss the case, the court (following the reasoning in Elliott) declared that as a matter of state law, an unguarded propeller was not defective.[49]

In a more encouraging recent decision for propeller guard advocates, on May 28, 1991, a third federal district court analyzed the preemption issue arising under the FBSA. In *Eggen v. Griffith, et al.*, Civ. No. B-C-89-31 (E.D. Ark. May 28, 1991) (order denying summary judgment), Jeffrey Eggen sued OMC for injuries sustained on August 13, 1986, when he fell from a Gator Pro 154 boat and was struck by the boat's unguarded 1984 50 horsepower Johnson outboard. Again, OMC asked the court to dismiss the lawsuit, arguing that it was preempted by the FBSA.

For a number of reasons, the court denied OMC's request. Before discussing any of the statutory or policy-based reasons for its ruling, the court noted that all critical factual aspects of the cause of action (the date of the injury, of the manufacture of the engine, and of the filing of the law suit) preceded the Coast Guard's February 1990 adoption of the NBSAC propeller guard subcommittee's recommendations. The court then reiterated "[t]he time honored rule that only regulations existing at the time the case of action accrued are applicable [to a

---

[49] But see, *Calabro v. Outboard Marine Corporation*, 1992 Fla. App. Lexis 6081 (May 26, 1992) (rejecting defendant's "assumption of the risk" defense).

preemption analysis]." [*Eggen* at 8] It refused to violate this rule, and held that the Coast Guard's purported "regulation" could not be applied retroactively to preempt Eggen's case.

Perhaps more importantly, the court also concluded that Eggen's case was not preempted by the FBSA, even without relying upon its "retroactivity" analysis. At the outset, the court noted the traditional presumption against a finding of preemption absent clear evidence of a Congressional intent to limit the sort of state action being challenged (here, an award of civil damages). As a matter of statutory interpretation, the court held both that the Coast Guard's propeller guard "regulation" had no preemptive power and that Congress (through the FBSA) did not intend to preempt tort actions like Eggen's.

First, the court recognized that only a "*regulation* prescribed under section 4302" of the FBSA would have the power to preempt certain state actions. [*Eggen* at 12, emphasis original] Noting that §4302 of the FBSA contains strict guidelines for the promulgation of boating safety rules, the court held that the Coast Guard's decision not to require propeller guards was not a 4302 "regulation" and should be given no preemptive effect.[50]

---

[50] Further emphasizing that only section 4302 regulation are to be given preemptive effect, the court also explained that Congress could have, but did not, append the FBSA's preemption clause to include the phrase "or agency inaction which is fundamentally equivalent to a section 4302 regulation." [*Eggen* at 12, 1991]

Reported Propeller Guard Litigation

1. *Fitzpatrick v. Outboard Marine Corporation*, No. 82-9635 (Ct of Common Pleas, Delaware County, PA, January 28, 1995). See also, Bolden, S., "Case Notes of Interest", February 1985 Philadelphia Trial Lawyers Association 3.

2. *Rose v. Mercury Marine, A Division of Brunswick Corp.*, 483 So. 2d. 1351 (Miss. 1986).

3. *Kunreuther v. Outboard Marine Corporation*, 715 F. Supp. 1304 (E.D. Pa. 1989), *modified*, 749 F. Supp. 658 (E.D. Pa. 1990).

4. *Elliott v. Brunswick*, CV 88-AR-1104-S (N.D. Ala. So. Div. Jan. 17, 1989) rev'd 903 F.2d 1505 (11th Cir. 1990).

5. *Shields v. Outboard Marine Corporation*, 776 F. Supp. 1579 (M.D. Ga. 1991).

6. *Eggen v. Griffith, et al.*, Civ. No. B-C-89-31 (E.D. Ark. May 28, 1991) (order denying summary judgment).

7. *Beech v. Outboard Marine Corporation*, 584 So.2d 447 (Ala. 1991).

8. *Mowery v. Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991).

9. *Veal v. Teleflex, et al.*, 586 So. 2d 188 (Ala. 1991).

10. *Calabro v. Outboard Marine Corporation*, 1992 Fla. App. Lexis 6081 (May 26, 1992).

Next, the court again looked to the explicit language of the FBSA's preemption clause and determined that

"nowhere is there reference to common law or state law tort actions . . . " Given the general presumption against preemption (which it had previously noted), the court concluded that Congress had not intended the FBSA to preclude tort claims like Jeffrey Eggen's. [*Eggen* at 13]

Finally, the court held that, even if it accepted OMC's arguments that the Coast Guard's inaction constituted a "regulation" and that the FBSA's preemption clause was potentially applicable to state tort actions, the Act's savings clause would preserve Eggen's claim. Rejecting OMC's argument for an interpretation of the savings clause inconsistent with its plain language, the court asked, "What in the world is this savings clause intended to address if not an action such as this?" [*Eggen* at 14]

Personal injury litigation has for decades been an effective public health tool, providing an important incentive for manufacturers to design and build safer products. [Teret, 1986; Eads, 1983] Several recent trial and appellate court decisions regarding propeller guards, however, have refused to allow a jury to weigh the costs and benefits to society of unguarded propellers versus propeller guards. These decisions weaken manufacturer incentive to make propellers safer.

In 1932, Judge Learned Hand stated in the influential case, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), that "[a] whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own test, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." A judicial determination that

unguarded propellers, as a matter of law, are not dangerous beyond the expectation of an ordinary consumer, however, implicitly violates the spirit of Judge Hand's decision. In many ways, a consumer's expectations about the safety of a product (and the feasibility of making it safer) are driven by the activities and information supplied by the manufacturer. If manufacturers do not provide propeller guards and do not warn users about dangers associated with unguarded propellers (alleged to be patent and obvious), they contribute greatly to the consumer's low expectations regarding the product.

Of course, preempting plaintiff's case entirely may have an even more chilling effect upon a manufacturer's incentive to make its products safer. Where that preemption is based upon government regulatory action or inaction, manufacturers may be strongly motivated to influence or control the very regulatory process which will subsequently insulate them from liability.

State Action

If the effectiveness of tort litigation as an impetus for manufacturers to provide propeller guards has been limited by recent decisions, then any legislative or regulatory action at the state or local level to encourage or require propeller guards may be especially valuable.

Representative Matthew O'Neill of the Missouri General Assembly recently sponsored a bill to require propeller guards for all propeller-driven recreational boats sold or operated in Missouri after January 1, 1993. [H.B. 1689, 86th Gen. Assem., 2d Reg. Sess., Missouri, 1992) The bill defines a propeller guard as including cage-type

guards (but not ring guards). Violation of the proposed law is criminalized as a class A misdemeanor, with repeat violations or those resulting in "serious personal injury or death" categorized as a class D felony. The bill provides various exceptions to the propeller guard requirements, including boats used for law enforcement, sanctioned racing, ferrying, or those engaged in interstate commerce[51] on the Missouri or Mississippi rivers. To date, the bill has not been reported out by the appropriate committee within the Missouri legislature.

State public health departments can also play a potentially important role in the enumeration and prevention of propeller injuries. The Institute of Medicine's[52] landmark 1988 report, *The Future of Public Health*, recommended that "every public health agency regularly and systematically collect, assemble, analyze, and make available information on the health of the community, including statistics on health status, community health needs, and epidemiologic and other studies of health problems." In the context of propeller injuries, this "assessment"

---

[51] Excepting boats engaged in interstate commerce from the bill reduces the likelihood of an FBSA preemption problem.

[52] The Institute of Medicine "identifies concerns in medical care, research, and education and secures the services of members of appropriate professions to examine policy matters relating to public health." The Institute of Medicine is part of the Academy complex, consisting of the Institute of Medicine, the National Academy of Sciences, the National Academy of Engineering, and the National Research Council. [Academy complex, 1991]

function is especially important and, as the report recognized, "cannot be delegated." [Institute of Medicine, 1988]

A responsible public health department cannot adequately assess the importance of propeller injuries based on the Coast Guard's data, nor can it rely on the Coast Guard for an appropriate resolution of the regulatory issues. The Coast Guard based its decision not to require propeller guards on patently inadequate data. Among the many data limitations, the NBSAC's propeller guard subcommittee admitted that Coast Guard statistics probably represented only five to ten percent of the true number of non-fatal propeller injuries; yet it concluded that propeller injuries were not an important public health problem.

A public health department can fulfill its assessment obligation for product-related injuries, like those associated with marine propellers, in a number of different ways. In most states, the Department of Natural Resources (or its analog) collects reports of recreational boating injuries and forwards them to the Coast Guard. These data can serve as a useful first step to compare the rates of injury within the state to those reported by the Coast Guard in its *Boating Statistics* report. If this initial analysis suggests that propeller injuries may represent a significant source of death and disability within the state (for example, propeller injuries are a vastly more serious problem in Florida than in Wyoming), a more sophisticated additional assessment can be performed. This might involve surveillance of emergency departments or questionnaires to local emergency medicine physicians

and orthopedic surgeons. Once the data have been gathered, the need for effective advocacy can be considered.

Even if scarce resources and competing public health problems prevent the sort of detailed assessment which propeller injuries warrant (an assessment, we have argued, which is more properly the responsibility of both the Coast Guard and the manufacturers) some involvement by state and local public health departments can still play an important role. It can sensitize the public about the dangers associated with unguarded propellers and perhaps alter expectations about the "obviousness" of the hazard and about manufacturers' ability to make propellers safer.

Conclusion

Solutions to the public health problem of propeller injuries demand appropriate action in each of the major forums that have been discussed. Neither the Coast Guard nor marine engine manufacturers have undertaken reasonable measures, clearly within their power, to reduce or eliminate these often preventable deaths and injuries. Instead, the very regulatory process which should act to make outboard motors safer has helped to insulate manufacturers from a remaining force for change, by preempting some personal injury lawsuits.

Additional advocacy for interventions designed to reduce the incidence and severity of propeller injuries is needed. The Coast Guard and manufacturers should reverse their opposition to propeller guards and act to require or voluntarily provide them. Meanwhile, public

health professionals in state departments, in other government agencies and in academic institutions should understand the extent of the propeller injury problem and support efforts to increase public awareness as well as manufacturer and government accountability.

Part Four

Propeller Injury Misconceptions

A clear understanding of the importance of the propeller injury problem and of the proper means to address that problem has been hindered by a number of misconceptions. In many ways this misinformation parallels that which has obstructed progress in reducing other product-related injuries. In order to justify and undertake effective action to reduce the incidence and severity of propeller injuries, these misconceptions require critical examination.

Misconception: *Propeller injuries are not an important public health problem. They occur infrequently by comparison with other recreational boating injuries and do not merit increased attention, given limited government resources.*

Propeller injuries are systematically and substantially underreported by the U.S. Coast Guard, the federal agency charged with maintaining boating injury statistics in the United States. The true annual incidence of propeller injuries may be as much as 34 times that officially reported by the Coast Guard. [Red Cross, 1991; Freund, 1979] Without reliable data for the true incidence and severity of propeller injuries, the Coast Guard (and others) cannot make justifiable policy determinations regarding these injuries. In addition, even if a specific

injury production mechanism occurs less frequently than others within an agency's purview, this does not necessarily justify a failure to appropriately address that mechanism. This is especially true for propeller injuries, given their devastating character and the promising nature of various countermeasures.

Misconception: *Most propeller injuries are the result of operator error. Therefore, the most effective way to prevent these injuries is through improved training of boat operators and better enforcement of boating safety rules.*

The 1984 Coast Guard study of propeller strikes concluded that operator inexperience may have been a factor in some of the propeller injuries analyzed but that safety training was not. [Traub, 1984] Public health practice in injury control has demonstrated that the most effective means of preventing product-related injuries is to modify the product rather than attempting to alter the behavior of millions of consumers. For example, air bags or seat belts which make the passenger compartment of a vehicle less hostile have proved effective in preventing motor vehicle-related deaths and injuries, while driver training courses have not. [Robertson, 1992]

Misconception: *The "open and obvious" danger of marine propellers justifies a manufacturer's failure to safeguard its motorboat engines.*

Every manufacturer who places a product into the stream of commerce has an obligation to make that product as safe as reasonably possible, while still permitting it to function as intended. Car fans, meat grinders, window fans, and the propellers of air boats like those used in the

Everglades all have blades whose danger, generally visible to potential victims, is more "open and obvious" than the dangers of motorboat propellers, which are hidden underwater. Yet all customarily include guards intended to separate people from injurious contact with those blades. Further, the fact that "innocent bystanders" (for example, swimmers run over by powerboats) can be the victims of unguarded propellers should nullify any "open and obvious" argument.

Misconception: *No hydrodynamically acceptable propeller guard has been designed. Propeller guards are not an appropriate safety device because they will diminish the top speed, fuel economy and maneuverability of a recreational boat.*

Although propeller guards have been used successfully in relatively low speed applications by surf rescue agencies in several countries and by the military for some training craft, marine propulsion manufacturers have not committed substantial research and development money to designing and manufacturing hydrodynamically acceptable propeller guards. For example, Mercury Marine admitted that, since the early 1970s, it had conducted fewer than ten research projects to design and evaluate devices intended to prevent or ameliorate propeller injuries. By comparison, major automobile manufacturers commonly engage in a more extensive testing program to design a single safety subsystem for one vehicle model within a single year.

Nevertheless, with far more limited resources, private entrepreneurs have developed promising propeller guard designs which have reduced top end speed by only ten percent or less. Boat handling with these guards has

been characterized as at least acceptable if not improved. The potential for improvement upon these results by a committed manufacturer is evident.

Further, it has been understood in other contexts that some trade-offs between performance and safety must be considered acceptable for a product capable of causing serious injury or death. For example, emission control devices for automobiles may result in hard starting and decreased fuel economy but the environmental and human health benefits have been deemed worth these costs. (It is also interesting to note that automobile manufacturers were able to substantially overcome these fuel efficiency and cold starting problems, after conducting intensive research and development.)

Misconception: *Propeller guards would not offer increased protection to people in the water. Striking a propeller guard will produce serious or fatal injuries (substituting severe blunt trauma for lacerative injuries) and create the potential for limb entrapment.*

A propeller guard's ability to protect persons in the water will depend on the velocity of the boat at impact. Available data suggest that a significant number of propeller injuries occur at low or idling speeds. The engineering consensus appears to be that, at speeds up to approximately 10 to 12 mph, a cage-type propeller guard can prevent the serious limb injuries often associated with unguarded propellers. At higher speeds, the protective effect of a guard is less well documented. Additional properly designed and unbiased impact tests employing cadavers or anthropomorphic human surrogates are needed. No history of limb entrapment in a ring-shaped guard was located; a properly designed cage guard would eliminate this potential.

Misconception: *By significantly enlarging the underwater profile of the boat/motor combination, guards increase the overall likelihood of being struck.*

The total area which the propulsion unit occupies in the water will, in fact, be increased by the inclusion of any device surrounding the propeller. For most, if not all, of the devices that have been developed, however, this does not amount to a "significant" increase. In most cases, someone who contacts the guard would have been struck by the propeller in the absence of a guard. Furthermore, some tradeoff between marginally increased risk of injury and greatly reduced severity of injury is appropriate and beneficial.

Misconception: *There is no consumer demand for propeller guards. Propeller guards would significantly increase the cost of a marine engine.*

There are very few data concerning the actual or anticipated consumer demand for propeller guards. Mercury Marine has admitted that it has never explored its customers' potential interest and attitudes towards propeller guards in any formal marketing study. (No such study conducted by any other marine engine manufacturer was discovered.)

Without appropriate consumer education, marketing and promotion by manufacturers, no reliable conclusions regarding the level of consumer acceptance of propeller guards can be drawn. It is instructive to note, however, that after General Motors first offered air bags on several of its 1974 model cars, it subsequently claimed that there was little demand for the safety device. Yet, as it turned out, GM and its dealers had actively discouraged sales of

this expensive option. [Kelley, 1980] Moreover, confidential GM studies showed a high potential demand for air bags once consumers were educated about their safety benefits. Today, the cost of air bags has declined, they are actively marketed by auto manufacturers and are readily accepted – even demanded – by many consumers. Like air bags, consumer acceptance of propeller guards may be largely manufacturer-driven. Also like air bags, implementation of propeller guards as original equipment can be expected to reduce overall societal costs associated with an often preventable injury.

There is also no reliable information on the increased cost associated with a standard equipment propeller guard, precisely because manufacturers have never seriously attempted to develop or market one. Propeller guards developed and manufactured by small entrepreneurs have been sold for approximately $125. [Chadwell, 1992] Economies of scale associated with mass production would be expected to significantly reduce this cost. Furthermore, propeller guards capable of protecting persons in the water could also provide some protection against propeller damage caused by underwater objects. By reducing the need for the purchase of a replacement propeller, the net cost of the guard to the consumer would be further reduced.

Part Five

Recommendations

If the public health problem of propeller injuries is to be properly addressed, the Coast Guard, marine engine manufacturers, the U.S. civil justice system, and state

government representatives must undertake a series of affirmative actions. These actions are summarized in the recommendations to follow. Their overall goals are to:

- ✦ Generate an improved and unbiased assessment of the scope and magnitude of propeller injuries;
- ✦ Heighten consumer awareness of the dangers associated with unguarded propellers and provide appropriate compensation for injured persons; and
- ✦ Require or encourage the development, testing and implementation of feasible counter-measures to prevent propeller injuries.

United States Coast Guard

✦ In its annual reporting and analysis of U.S. boating injury data, the Coast Guard (following the Red Cross's lead in its recent survey) should establish a separate category for "struck by propeller" incidents to enable improved understanding of the propeller injury problem.

✦ In its annual reporting and analysis of U.S. boating injury data, the Coast Guard should identify all propeller injuries, whether or not the propeller strike was the first or a later event in an injury-producing sequence.

✦ The Coast Guard should improve the reporting rate for non-fatal injuries (rather than simply conceding that the reporting rate for non-fatal injuries is 10 percent or less). This may be accomplished through active and effective methods for injury surveillance such as hospital

emergency room and discharge data or physician questionnaires, or at least by increased publicity and enforcement of the existing reporting requirements.

✦ The Coast Guard should reverse its acceptance of the findings and recommendations of the NBSAC propeller guard subcommittee because of the subcommittee's reliance upon incomplete data on the incidence, severity and prevention of propeller injuries.

✦ After gathering and analyzing improved propeller injury data (including data generated by the Red Cross and upcoming reports), the Coast Guard should reassess the feasibility and desirability of propeller guards. The Coast Guard might be guided in this endeavor by the recommendations of its own staff and consultants, including the recommendations contained in reports by Freund, Traub and Purcell.

Manufacturers

Any manufacturer who places a product capable of causing harm into the stream of commerce has an obligation to its users to make it as safe as reasonably possible without preventing the product from functioning as intended. For recreational boat engine manufacturers, this means at a minimum:

- ✦ Actively monitoring and reporting the incidence and severity of propeller injuries caused by their products;
- ✦ Engaging in appropriately funded and targeted research and development to explore ways to reduce or eliminate propeller injuries; and

- Providing adequate warnings and consumer information concerning the threat posed by unguarded propellers.

Litigation

- The U.S. civil justice system should allow juries (assisted by expert testimony) to reach decisions regarding the potentially defective character of unguarded propellers as well as the feasibility of countermeasures to prevent propeller injuries. This policy will allow appropriate compensation for victims of propeller-related injuries (by shifting the cost of those injuries to manufacturers, the group best able to insure against the costs and to reduce the potential for costly injuries in the first place) and will provide manufacturers with enhanced incentive for product modification.

Congress

- If the Coast Guard does not adequately respond to the recommendations contained in this report, Congress should consider exercising its oversight function to hold public hearings addressing regulatory solutions to prevent propeller injuries.

State Action

- In the absence of an effective strategy by the federal government or manufacturers to reduce the incidence and severity of propeller injuries, state legislatures should draft and enact appropriate legislation (within the

confines of federal preemption) to require counter-measures such as propeller guards.

- To the extent possible, given limited resources, state and local public health departments should assess the incidence and severity of the propeller injury problem within their jurisdictions. Where appropriate, these agencies should sensitize their constituencies as to the dangers associated with unguarded propellers and to the feasibility of making propellers safer.

References

Academy Complex. Questions and answers about the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and the National Research Council, August 1991.

American Red Cross, *National Boating Survey*, Washington, DC: American Red Cross, 1991.

Baker, S.P., O'Neill, B., Ginsburg, M.J., Li, G. *The Injury Fact Book*, 2nd ed. New York: Oxford University Press, 1992.

Banta, J.V. Epidemiology of waterskiing injuries. *The Western Journal of Medicine* 130:493-497, 1979.

Barham, H.L. Application of waterjet propulsion to high-performance boats. *Hovering Craft and Hydrofoil* 15(9):33-43, 1976.

Beech v. Outboard Marine Corporation, 584 So. 2d 447 (Ala. 1991). Includes deposition and trial transcripts.

Bolden, S.R. Case Notes of Interest, Fitzpatrick v. Outboard Marine Corporation. *Philadelphia Trial Lawyers Association*, February 1985, pp. 3-4.

Brandau, J.H. Aspects of performance evaluation of waterjet propulsion systems and a critical review of the state-at-the-art. NSRDC-2550. Washington, DC: Naval Ship Research and Development Center, Hydromechanics Lab, October 1967.

Brunswick Corporation. *Annual Report*, 1989.

Budrin, IuP. Lesions from screw propellers. *Sud Med Ekspert* 19(4):47-49, 1976.

Calabro v. Outboard Marine Corporation, 1992 Fla. App. Lexis 6081 (May 26, 1992).

Chadwell, B. Personal communication, June 23, 1992.

Consensus Conference. Osteoporosis. *JAMA* 252(6):799-802, 1984.

Crew, T.F. *Outboard motor guard*. U.S. PATENT 2,706,960; April 26, 1955.

Eads. G., Reuter P. *Designing safer products*. Rand, The Institute for Civil Justice.

Eggen v. Griffith, et al., Civ. No. B-C-89-31 (E.D. Ark. May 28, 1991) (order denying summary judgment).

Eller, D.E. *Motorboat propeller guard for improved performance*, U.S. PATENT 4,680.017; July 14, 1987.

Elliott v. Brunswick, CV 88-AR-1104-S (N.D. Ala. So. Div. Jan. 17, 1989) *rev'd* 903 F.2d 1505 (11th Cir. 1990), includes deposition and trial transcripts.

Fitzpatrick v. Outboard Marine Corporation, No. 82-9635 (Ct of Common Pleas, Delaware County, PA, January 28, 1985).

Florida Power and Light Company. *The West Indian Manatee in Florida*, 1987.

Freund, K. "Struck by propeller" accidents – 1978." Informal staff analysis. Washington, DC: Department of Transportation (United States Coast Guard), 1979.

Gomez, G.A., Martin, L.C, Castro, M.R. Nautical accidents. *Surgical Clinics of North America* 71(2):419-432, 1991.

Grace, N. Water skiing hazards: Nature and prevention. *Journal of Sports Medicine* 2(4):212-216, 1974.

Haddon, W. On the escape of tigers: An ecologic note. *Technology Review* 72(7):44, 1970.

Haddon, W., Baker S.P. Injury control. In D. Clark and B. MacCahon (eds.), *Preventive and Community Medicine*. Boston: Little, Brown and Company, pp. 109-140, 1981.

Hargarten, S.W., Karlson, T., Vernick, J.S., Aprahamian, C. "Outboard motor propellers and injuries: Enumeration, prevention, and policy." Unpublished manuscript, 1992.

Hawthorne, J.L. *Propeller guard*. U.S. PATENT 951,608: March 8, 1910.

Holtermann, T.J. *Marine propulsion device including propeller shroud*. U.S. PATENT 4,304,558: December 8, 1981.

Hill, J.G. "the technological feasibility of propeller guarding for pleasure planing craft." Unpublished report, February 10, 1987.

Hogan, R.B. Propeller guards for recreational boats. *Trial* 25(3), March 1989a.

Hogan, R.B. Propeller guard diver tests performed on the Coosa river and accompanying videotape, 1989b.

Hogan, F.M. *Propeller guard for outboard motors*. U.S. PATENT 3,075,491; January 29, 1963.

House of Representatives. House rep. No. 58 101st Cong. 2d Sess. 37 (1990).

Howland, J., Hingson, R., Levenson, S., et al. Alcohol use and aquatic activities-Massachusetts, 1988. *MMWR* 39(20):332-334, May 25, 1990.

Huelke, D. Personal communication, June 30, 1992.

Hummel, G., Gainor, B.J. Waterskiing-related injuries. *American Journal of Sports Medicine* 10(4):215-218. 1982.

Institute of Medicine. *The Future of Public Health*. Washington, DC: National Academy Press, 1988.

Jackson, F.E. High speed propeller injuries of the brain. *American Journal of Surgery* 110:473-476, 1965.

Kelley, A.B. *Passive vs. active=life vs. death*. SAE Technical Paper No. 750391. Warrendale, PA: Society of Automotive Engineers, 1975.

Kelley, A.B. GM and the air bag: A decade of delay. *Business and Society Review*. Fall 35:54, 1980.

Kerlin, D.J. "Struck by boat or propeller manual analysis of 1983-1987 Coast Guard data." Unpublished data analysis. September 22, 1988.

Kress, T.A., Snider, J.N. Evaluation of a boat motor cage-type propeller guard as a protection device for the human leg. Unpublished manuscript. University of Tennessee, August 1991.

Kutarski, P.W. Outboard motor propeller injuries. *Injury* 20:87-91, 1989.

Lambrecht, R.E. *Water jet propulsion – Competition for propellers?* SAE Technical Paper No. 740283. Warrendale, PA: Society of Automotive Engineers, 1974.

Lebowitz, L.J. "Tragedy brings plea for safer boats." *Orlando Sentinel*, September 11, 1989.

Levy, M., Goldberg, I., Stern, G.M. Injuries caused by speed-boats. *Harefuah* 96(2):106-107, 1979.

Lilienfeld, A.M. *Foundations of Epidemiology*. New York: Oxford University Press, 1977.

Lineaweaver, W.C., Follansbee, S., Hing, D.N. Cefotaxime-sensitive *aeromonas hydrophila* infection in a revascularized foot. *Annals of Plastic Surgery* 20(4):322-325, April 1988.

Marinemotive Engineering, Inc. "Prop Mate. For outboard inboard or sterndrive." Unpublished advertising material, 1990.

Mann, R.J., Propeller injuries. *Southern Medical Journal* 69(5) 567-169, 1976.

Marmo, A.J. Memorandum to the Chief, Boating Technical Division. Washington, DC: United States Coast Guard, November 20, 1979.

Mercury Marine. Request for test and attached laboratory test results. May 10, 1973.

Mercury Marine. Lake X final test report for test request TR-3653. April 16, 1974.

Mercury Marine. Lab report from Chuck Mapes to Ted Morgan, July 28, 1980.

Mercury Marine. Test report from Jack Litjens to Joe Pomeroy. Subject: Chadwell propeller guard testing TR 871777, October 7, 1987.

Mercury Marine. Lab report from Jack Litjens to Dick Snyder. Subject: Prop-guard testing at the Coronado Island Marine Corps. Amphibious Test Base at San Diego, California, June 5, 1989.

Mowery v. Mercury Marine, 773 F.Supp. 1012 (N.D. Ohio 1991).

National Boating Safety Advisory Council, Propeller Guard Subcommittee. Report of the Propeller Guard Subcommittee. Washington, DC: United States Coast Guard, November 7, 1989.

National Committee for Injury Prevention and Control. *Injury Prevention – Meeting the Challenge*. New York: Oxford University Press (Published as a supplement to the *American Journal of Preventive Medicine* Vol. 5 No. 3, 1989.

National Academy of Sciences, *Injury in America*, Washington, DC: National Academy Press, 1985.

Nelson, R.T. Letter from Rear Admiral United States Coast Guard to A. Newell Garden, Chairman NBSAC, February 1, 1990.

Noel, J.V., Beach, E.L. *Naval Terms Dictionary*, 5th ed. Annapolis, MD: Naval Institute Press, 1988.

Outboard Marine Australia Pty. Limited. Memo from Higgs to Alex Marconi, Outboard Marine Corporation, September 19, 1977.

Outboard Marine Corporation. Propeller guard efficiency. Final report No. 441-1. February 8, 1978.

Outboard Marine Corporation. Competitive boat performance tests of the national council safety guard and the OMC propeller guard. Engineering report: October 25, 1979.

Outboard Marine Corporation. Propeller guard. Report No. 443-1. May 11, 1981.

Outboard Marine Corporation. *Annual Report*, 1989.

Outboard Marine Corporation (1990) "Propeller sales, gearcase sales," 1990.

Patent and Trademark Office. *Manual of Patent Examining Procedure*. Washington, DC: United States Department of Commerce, 1987.

Paterson, D.C Water-skiing injuries. *Practitioner* 206:655-661, 1971.

Peeler, M.O. "Fatalities from recreational boating mishaps in Maryland, 1983 to 1987." M.S. dissertation, The Johns Hopkins School of Hygiene and Public Health, 1990.

Powell, S.F. Letter to Commandant United States Coast Guard accompanying Purcell report, March 18, 1987.

Pree v. Brunswick Corporation. Cause No. 89-1996-C-1 (U.S. District Court, E.D. Missouri, 1989).

Price, C.T., Moorefield, C.W. Motorboat propeller injuries. *Journal of the Florida Medical Association* 74(6):399-401, 1987.

Purcell, E.S, Lincoln, W.B. "Boat and propeller impact injuries and fatalities." Coast Guard Research and Development Center, March 1, 1987.

Reed, A.M. "Comparative performance tests with a second-generation Chadwell propeller guard." Unpublished report. May 1987.

Reed, A.M. "The feasibility of propeller guarding." Unpublished report. July 1987b.

Reid, J.P., Rathbun, G.B. "1985 manatee identification catalog update." Unpublished report. Florida Power and Light Company, 1986.

Robertson, L.S. (1992) *Injury Epidemiology*. New York: Oxford University Press, 1992.

Romano, R.L., Burgess, E.M., Andrews, C.B. Medical implications of water-skiing. *Clinical Orthopaedics and Related Research* 23:140-145, 1962.

Schenk, J.A. (1973) Mercury Marine Office Memo to Bob Johnson, October 1, 1973.

Scott, A. " 'Personal watercraft' taking off." *The Baltimore Sun*, June 18, 1989.

Seidman, D. More oomph for kicker outboards. *Boating World* 96-98, 1992.

Shields v. Outboard Marine Corporation, 776 F.Supp. 1579 (M.D. Ga. 1991).

Sleight, M.W. Speedboat propeller injuries. *British Medical Journal* 2:427-429S, 1974.

Snyder, R.H. Letter to Al Marmo, United States Coast Guard, December 15, 1980.

Snyder, R.H. Mercury Marine Office Memo to Jim Getz-NBSAC, Chairman, Subcommittee on Prop Guarding, October 6, 1988.

Snyder, R.H. Letter to James E. Getz, Chairman NBSAC Propeller Guard Subcommittee, and attachments describing testing of Snyder/Wald cage, May 30, 1989.

Metropolitan Life insurance Company. Recreational boating fatalities 1978-82. *Statistical Bulletin* 65(2):2-6, 1984.

Sustic, V. Drescik, I. A contribution to the problem of injuries caused by speedboat propellers. *Lijecnicki Vjesnik* 92(6):663-667, 1970.

Taggart, R. Review of the state of the art of swimmer protection from outboard motor propellers. RTI Incorporated. Unpublished report. February 16, 1979.

Taylor, R. Personal communication, June 25, 1992.

Teret, S.P. Litigating for the public's health. *American Journal of Public Health* 76(8):1027-1029, 1986.

Thibault, L.E. Propeller guarding, Test report with letter report to Stephen R. Bolden. August 14, 1987.

Thibault, L.E. *Safety propeller.* U.S. PATENT 5,004,884: September 3, 1991.

Traub, G. (1984) Steering/struck-by-propeller accident study, 1983 recreational boating accidents. G-BP-1. Washington, DC: United States Coast Guard, December 18, 1984.

United States Coast Guard. *Boating Statistics.* Washington, DC: U.S. Department of Transportation, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988a, 1989, 1990.

United States Coast Guard. Response to letter from the Honorable Orrin G. Hatch, April 1988b.

Veal v. Teleflex, Inc., et al., 586 So.2d 188 (Ala. 1991).

Watson, B.W., Watson, S.M., eds. *United States Navy: A Dictionary.* New York: Garland Publishing, Inc., 1991.

Williams, M. "Grisly accidents spark campaign for guards on boat propellers." The Atlanta Journal and Constitution, September 28, 1989.

Motorboat
Propeller
Injuries

Johns Hopkins University Injury Prevention Center
624 North Broadway
Baltimore, Maryland 21205

Institute for Injury Reduction
375 Prince George's Boulevard
Upper Marlboro, Maryland 20772

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-288

In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONERS

DAVID E. HUDSON*
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
Suite 700 – SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481

R. BEN HOGAN, III
HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203
(205) 324-5635

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

55 pp

QUESTION PRESENTED

Petitioners' daughter was killed in a boating mishap when struck by the propeller of an engine manufactured by Respondent. Petitioners claim that the failure of Respondent to provide a propeller guard or other protective device on its product violates several common law duties.

Are these common law claims pre-empted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311, where the Act (a) expressly pre-empts only those state laws that conflict with regulations promulgated by the Coast Guard, which has never promulgated a regulation concerning propeller guards; and (b) the Act provides that "[c]ompliance with [the Act] does not relieve a person from liability at common law"?

PARTIES TO PROCEEDINGS

To the best of Petitioners' knowledge, the caption contains all of the parties to this action. Petitioner draws the Court's attention to Respondent's Rule 29.6 Statement in the Brief For The Respondent In Opposition, which sets forth Respondent's nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS IN THE CASE 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. THE DEATH OF KATHRYN C. LEWIS 2

2. THE BOAT SAFETY ACT 3

3. THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS 8

SUMMARY OF THE ARGUMENT 12

ARGUMENT 16

I. Common Law Claims Are Not Expressly Pre-empted by the Boat Safety Act 16

A. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Express Pre-emption 16

B. Common Law Is Not Within the Domain Expressly Pre-empted By the Boat Safety Act 24

C. The Savings Clause Clearly Establishes that Common Law Claims Are Not Within The Domain Expressly Pre-empted 28

II. Common Law Claims Are Not Impliedly Pre-empted by the Boat Safety Act 31

TABLE OF CONTENTS – Continued

Page

A. The Boat Safety Act Provides A "Reliable Indicium of Congressional Intent with Respect to State Authority," Raising an Inference that Further Implied Pre-emption is Inapposite 31

B. It is Not Impossible for Brunswick to Comply with Both the Boat Safety Act and Common Law 33

C. Petitioners' Common Law Claims Do Not Frustrate the Purposes of Congresss 34

1. There is No Federal Propeller Guard Mandate to Frustrate 34

2. Common Law Promotes Congressional Purposes 36

CONCLUSION 39

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U.S. 767 (1947) 24

California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 14

Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) 30

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 12, 14, 16, 23, 27, 32, 36

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 14, 16, 32

English v. General Electric Co., 496 U.S. 72 (1990) 27

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 23

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) ... *passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 27

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 23

Hines v. Davidowitz, 312 U.S. 52 (1941) 34

Keene Corp. v. United States, 508 U.S. 200 (1993) 30

Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997) 1

Lewis v. Brunswick Corp., 922 F.Supp. 613 (S.D. Ga. 1996) 1

Malone v. White Motor Corp., 435 U.S. 497 (1978) 31

Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996) 12, 15, 16, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs, 461 U.S. 624 (1983)..... 26

Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir.), *cert denied*, 439 U.S. 862 (1978)..... 18, 19, 20, 21

Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 496 (1988).....23, 36

Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)..... 31

Russello v. United States, 464 U.S. 15 (1983)..... 30

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 22, 23, 27, 36, 38

Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619 (1996)..... 27

STATUTES

5 U.S.C. App. 2 ("Federal Advisory Committee Act of 1972").....9, 21

5 U.S.C. § 553 ("Administrative Procedure Act")....*passim*

12 U.S.C. § 1715z-12, -18(e)(1989) ("Domestic Housing and International Recovery and Financial Stability Act")..... 25

15 U.S.C. §§ 1381 *et seq.* (1982) ("National Traffic and Motor Vehicle Safety Act of 1966").....18, 29

17 U.S.C. § 301(a)(1977) ("Copyright Act of 1976") 25

28 U.S.C. § 1441(a) 2

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1144(a), (c)(1)(1985) ("Employee Retirement Income Security Act of 1974")..... 25

46 U.S.C. §§ 4301-4311 ("Federal Boat Safety Act of 1971")..... *passim*

REGULATIONS

32 Fed.Reg. 14,278 (1967) 20

34 Fed.Reg. 1055 (1969)..... 20

35 Fed.Reg. 10,368 (1970) 20

36 Fed.Reg. 3817 (1971)..... 19

44 Fed. Reg. 46,849 (1979) 19

LEGISLATIVE HISTORY

MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971)..... *passim*

S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333..... *passim*

OPINIONS AND ORDERS IN THE CASE

1. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996) (Pet. App. A26). Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy) and 28 U.S.C. § 1441(a) (removal).

2. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997) (Pet. App. A1). Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997 (Pet. App. A33).

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on March 21, 1997, and denied rehearing on May 15, 1997. The petition for writ of certiorari was filed on August 13, 1997. This Court granted certiorari on November 14, 1997.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and regulations are lengthy and are reprinted verbatim in the appendix to this brief. These provisions are 46 U.S.C. §§ 4302, 4306, and 4311, and 5 U.S.C. § 553.

STATEMENT OF THE CASE

1. THE DEATH OF KATHRYN C. LEWIS

Kathee Lewis was a 19 year old college student from Healdton, Oklahoma, and the daughter of Petitioners Vicky and Gary Lewis (the "Lewis Family"). Joint Appendix ("App.") 4, 6. On June 6, 1993, she was a passenger on a boat on Strom Thurmond Lake in Georgia at the invitation of her boyfriend's family. App. 5. This boat was powered by an outboard motor manufactured by Respondent Brunswick Corporation ("Brunswick"). App. 32-33. The engine had exposed propeller blades and no protective guard, shroud, or nozzle. App. 33-34.

During a turning maneuver, Kathee Lewis was ejected from the boat and struck by the rapidly rotating propeller blades of the outboard motor manufactured by Brunswick. App. 32. Kathee was pronounced dead at the scene. App. 32, 5-6. The coroner's report concluded that Kathee's death was caused by "chop wounds to (the) head and upper body." *See* App. 6, 32-33.

On June 2, 1995, the Lewis Family filed suit in the Superior Court of Columbia County, Georgia against Brunswick. App. 4. The crux of the complaint involves Brunswick's failure to provide a guard to protect Kathee from contacting the whirling propeller blades and thereby preventing her fatal injuries. The Lewis Family contends that Brunswick is liable under strict liability and negligence theories for its failure to provide such a guard. *See generally* App. 6-13. Brunswick removed the case to the United States District Court for the Southern District of Georgia pursuant to 28 U.S.C. § 1441(a). App. 1.

Brunswick moved for summary judgment, arguing that the Lewis Family's common law claims are pre-empted by the Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ("Boat Safety Act"). App. 1. This Act provides that certain state "law[s]," "regulation[s]" and "requirement[s]" which conflict with enacted federal regulations are pre-empted, while also providing that "[c]ompliance with [the Act] does not relieve a person from liability at common law or under state law." *See* 46 U.S.C. §§ 4306, 4311(g).

Summary judgment was granted to Brunswick by the district court, and affirmed by the United States Court of Appeals for the Eleventh Circuit. App. 2, 3. The Eleventh Circuit held that the Lewis Family's common law claims were not expressly pre-empted by the Boat Safety Act. Pet. App. A14. The circuit court went on to hold, however, that Petitioner's common law claims were impliedly pre-empted. Pet. App. A24. The lower court reasoned that Congress had intended to pre-empt the entire field of boat safety, even though the federal government never promulgated a regulation on propeller guards, and even though the Act had an express savings provision. Pet. App. A21-A23.

2. THE BOAT SAFETY ACT

Congress enacted the Boat Safety Act to address perceived shortcomings in boating safety and existing federal boating legislation. Specifically, the existing scheme had a "serious deficiency" in that it placed the burden of safety compliance solely on the boat owner or operator, even for safety equipment that was "almost always sold

as an integral part of the boat or engine." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1335. "Clearly," the Senate Report stated, "equity requires that the responsibility at the outset for providing the boatman with a safe boat must lie with the manufacturer. Practicalities of enforcement and the tremendous growth in numbers of boats and boatmen require the same result." *Id.*

The purpose of the Act was thus to "provide a coordinated national boating safety program involving both the Federal Government and the States." *Id.* at 1333. Among other things, Congress also wished to "encourag[e]" uniformity among boating laws, reciprocity, comity, and cooperation among jurisdictions and levels of Government. *Id.* at 1337. Congress thought the Act necessary since "[s]imilar federal legislation exists with regard to other products, including aircraft and motor vehicles." *Id.* at 1337.

In furtherance of these goals, the Boat Safety Act provides that the Coast Guard "*may* prescribe regulations" to establish "*minimum* safety standards" for boating equipment. 46 U.S.C. § 4302(a)(1) (emphasis added). Congress thought the "standards to be promulgated" under section 4302 of the Act "could substantially reduce the level of fatalities now resulting from boat mishaps." S. REP. No. 248, 92nd Cong., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1334. This approach would also allow for greater flexibility in enacting regulations. *Id.* at 1335. Such potential standards were necessary because the "industry readily admits that one-fourth of all boat manufacturers do not comply with . . . the industry's self-imposed minimum safety standards." MERCHANT

MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 82.

The Coast Guard's authority to issue minimum safety standards under section 4302 of the Boat Safety Act is permissive, and not mandatory. S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1338. The Act specifically sets forth the procedures that the Coast Guard must follow to prescribe such a regulation, including the actual publishing of a standard and the express provision for a future effective date after its initial publication. 46 U.S.C. § 4302(b). Thus Congress

> requires certain actions by the [Coast Guard] in the development of safety standards. . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the informal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553.)

S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340. Any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

Another problem with the prior law was that it specifically required boat operators to comply with varying state legislative or administrative numbering requirements. *See* MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 101. Moreover States had also enacted several regulations in regard to capacity and safe powering standards, and "it is only a matter of time before

more States become actively involved in writing safety standards which will have broad application to manufacturers." *Id.*[1] Congress thus provided in the Boat Safety Act that any state "law," "regulation" or "requirement" which conflicted with "a regulation prescribed under section 4302" of the Act was pre-empted. 46 U.S.C. § 4306.

A congressional subcommittee also specifically added a "savings clause" to the Boat Safety Act prior to passage, which provides that "[c]ompliance with [the Boat Safety Act or regulations prescribed thereunder] does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). This committee amendment was added due to the urging of Richard Schwartz, the Executive Director of the Boat Owners Association of the United States, who testified that

> we would recommend a savings provision with respect to the consumers' private remedies, which is not touched upon by the present Bill. We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits. It should be made clear that this Act *does not preempt state or common law.* In addition, we would further state that the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. *This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition.*

---

[1] This warning obviously concerned state enactments of legislation or administrative rules, and not common law tort concepts which pre-dated the Boat Safety Act.

MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88 (emphasis added). Thus the savings clause

> is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value.

S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352. The savings clause is the only portion of the Boat Safety Act which addresses private remedies for the victims of tortious behavior.[2]

---

[2] The Commandant of the Coast Guard, in response to a Senator's question about the inclusion of an express savings clause, also stated that

> [w]e do not believe that compliance with promulgated standards under the Act has the effect of relieving a manufacturer from liability under the usual tort law concerning negligence or warranties. For many years the Coast Guard has required compliance with "standards" by inspected vessels. Courts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with "seaworthiness" under maritime law. Though the analogy is apparent we would have

3. THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS

The need to address propeller injuries in recreational boating has been long recognized. Since the 1970's, "propeller injuries have been demonstrated in the medical literature as a dramatic but largely preventable class of injury." App. 175. Propeller injuries frequently involve multiple wounds which can result in death or "traumatic or surgical amputation." App. 178. Since the injuries are incurred in the water, there is significant blood loss (due to increased coagulation time) and risk of infection from water-borne organisms. App. 178. A 1992 study found that the victim's average cost for hospital and physician care alone exceeded $100,000 per serious injury. App. 178.

Since 1910, at least 21 patents for propeller guards have been awarded by the United States Patent Office. App. 205-206. Mercury Marine, a division of Respondent and the dominant manufacturer in the boating propulsion market[3], has tested propeller guards and water jets since the early 1970's. App. 213. Many of the Mercury tests noted little impact on running speed or performance. App. 213-215. One of Respondent's competitors (OMC)

> no objection to an express provision to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability which otherwise could pertain.

MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 66.

[3] In 1988, Mercury earned greater than $280 million while its next largest competitor (OMC) reported net earnings of $70 million. App. 236.

sells propeller guards for boats operating at 15 miles per hour or less, and several private companies have offered guards as after-market accessories. App. 237, n.38, n.40. Propeller guards are also used by the United States Marine Corps and several international rescue units. App. 62-64.[4]

On April 13, 1988, the Coast Guard asked the National Boating Safety Advisory Counsel ("NBSAC") to consider whether the Coast Guard "should . . . move towards a federal regulation for some form of propeller guard." App. 76. On May 11, 1988, NBSAC in turn appointed a subcommittee to consider the Coast Guard's question. App. 46. NBSAC is considered an advisory committee to the Coast Guard under the Federal Advisory Committee Act of 1972 ("FACA"). *See* 5 U.S.C. App. 2. It is difficult to track the deliberations of the advisory subcommittee, however, since no minutes or transcripts of individual meetings of the subcommittee were kept. Dist. Ct. Dkt. 5, Exh. 9, pp. 18-19. Notes kept by the individual members of the subcommittee were discarded, and there was no attempt to maintain such documents. *Id.* at pp. 36-37. Preliminary drafts of the final report of the subcommittee are not extant, either. *Id.* at p. 20. Importantly, no notes exist of an *ex parte* demonstration which Richard Snyder of Respondent's Mercury Marine division held for several members of the advisory subcommittee in Oshkosh, Wisconsin, at which no federal agent was present. *Id.* at pp. 8-11.

---

[4] *See generally* App. 199-225 for a more thorough discussion on propeller guard feasibility and testing.

The recommendation of the subcommittee to the advisory board was ultimately that "the U.S. Coast Guard should take no regulatory action to require propeller guards" at that time. App. 73. In arriving at this recommendation, the propeller guard subcommittee specifically noted the presence of product liability claims against boat manufacturers (App. 50-53), yet never urged their pre-emption. The subcommittee also noted that it could not recommend propeller guard regulations

> [s]ince there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible.

App. 71. The subcommittee did not state that propeller guards were dangerous in all cases.[5]

On November 7, 1989, NBSAC approved the subcommittee's advisory report. App. 138. The NBSAC Chairman assured the council and the public that the issue of propeller guards "is not a dead issue," however, and stated that a subcommittee would be reconvened if new information became available. App. 139.

The Coast Guard then, by letter dated February 1, 1990, adopted all of the recommendations in the subcommittee's advisory report – including the recommendation that the Coast Guard "should take no regulatory action to require propeller guards." App. 163. In adopting this

[5] For a detailed criticism of the advisory subcommittee's investigation and recommendation, *see generally* App. 230-235.

recommendation, the Coast Guard reiterated the concern that there was no universal design then available:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 163. The Coast Guard, like NBSAC and its advisory subcommittee, never indicated that it intended to ban propeller guards or to pre-empt common law actions relating to such guards. As a matter of fact the Coast Guard, in that same letter of February 1, stated that it was considering "available propeller guards" as a topic for national education programs "aimed at avoiding boat/propeller strike accidents." App. 165.

In adopting the recommendation not to undertake regulatory action, the Coast Guard never began (much less finished) the regulatory procedure set forth in either section 4302 of the act, or in the Administrative Procedure Act, to create a regulation which addressed propeller guards at all. Nothing was ever published in the Federal Register relating to proposed (let alone final) rulemaking on propeller guards, nor does the record reflect that the Coast Guard ever held a notice-and-comment period on propeller guard regulations. The Coast Guard also never published its decision to take no regulatory action as required for regulations.

SUMMARY OF THE ARGUMENT

The Lewis Family's common law claims against Brunswick are not pre-empted by the Boat Safety Act.

In order to determine the pre-emptive scope of the Boat Safety Act, this Court must first "identify the domain expressly pre-empted" by the Act. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996). The Boat Safety Act expressly pre-empts only the implementation of certain state "law[s]," "regulation[s]" or "requirement[s]" which conflict with "a regulation prescribed under section 4302 of [the Act]." 46 U.S.C. § 4306. In order for a regulation to be promulgated under section 4302 of the Boat Safety Act, Congress required that it be published and have a future-effective date at least 180 days from the date of publishing. 46 U.S.C. § 4302(b).

The only "action" taken by the Coast Guard concerning propeller guards was to adopt an advisory recommendation *not to even undertake regulatory action* because (in part) it could not arrive at a universal design for all boat engines. This adoption was not the subject of any rulemaking proceeding, was never published in the Federal Register, and was never made subject to a "future effective date." This mere adoption of a recommendation not to undertake regulatory action was therefore not "a regulation prescribed under section 4302" of the Boat Safety Act. Common law actions concerning propeller guards are thus not within the domain expressly pre-empted by the Boat Safety Act since there is no federal regulation concerning propeller guards whatsoever. This Court recently addressed a virtually identical issue in

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995), and found that common law claims were not pre-empted under a similar statute where there was no federal regulation governing the relevant safety feature.

Furthermore, the text of the Boat Safety Act's pre-emption and savings clauses also show that Petitioner's claims are not within the domain expressly pre-empted. The pre-emption provision refers to state legislative and administrative enactments, but does not refer to common law. Moreover, Congress expressly provided in the Act's savings clause that "[c]ompliance with [the Boat Safety Act or regulations promulgated under it] does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g). The fact that the Boat Safety Act does not refer to "common law" in its express pre-emption clause, *coupled with the express reference to "common law" in the savings clause*, leads to the logical conclusion that common law tort claims are not part of the "domain expressly pre-empted" by the Boat Safety Act. The legislative history also confirms that Congress contemplated the survival of common law actions in situations where, as here, the Coast Guard chose not to enact any regulation on point.

It is also improper to imply pre-emption in this case. When Congress has considered the issue of pre-emption and expressly sets forth the pre-emptive scope of an act, there is an inference that Congress has spoken conclusively on the pre-emption question and that, therefore, further pre-emption should not be found by implication. *Freightliner*, 115 S. Ct. at 1488. "Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the

pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

The Court must therefore determine whether the implication of further pre-emption is warranted, or whether the pre-emptive scope of the act is "governed entirely" by the express language in the Act. *See Cipollone*, 505 U.S. at 517; *Freightliner*, 115 S. Ct. at 1488. The best evidence of Congress' pre-emptive intent is the plain wording of the legislation itself. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). As shown above, Congress has expressly stated what it was pre-empting; what it was saving from pre-emption; and what the federal agency must do to create a potentially pre-emptive regulation. 46 U.S.C. §§ 4306, 4311(g). Thus the language of the Boat Safety Act gives a "reliable indicium of Congressional intent with respect to state authority" and *entirely governs* its pre-emptive scope. *See Cipollone*, 505 U.S. at 517. The further implication of pre-emption beyond Congress' express text is therefore improper.

Moreover, this Court has recognized only two instances in which implied pre-emption may exist in the face of an express pre-emption clause. The first instance is where it is impossible for an actor to comply with both the federal law and state law. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). This conflict must be so great as to make it *physically impossible* for a party to comply with both federal and state law. It is not physically impossible for Brunswick to comply with both the Boat Safety Act and state law, since there is no enacted regulation which addresses propeller guards at all, and Respondent concedes that federal law in no way

prohibited it from installing a guard on the propeller that caused Kathee Lewis' death. A finding of tort liability will therefore not mandate any outcome which is not allowable under federal law. *See Freightliner*, 115 S. Ct. at 1488; *Medtronic*, 116 S. Ct. at 2258.

The second instance is when the preservation of common law claims would stand as an obstacle to the objectives of Congress in enacting the legislation at issue. The lack of any federal regulation on the issue of propeller guards establishes that there is no federal purpose to frustrate. *See Freightliner*, 115 S. Ct. at 1488. Moreover, since Congress expressly saved "liability at common law" from pre-emption in the Boat Safety Act, it is illogical to conclude that common law liability stands in the way of congressional purpose. Rather, this express saving of common law shows that Congress intended to allow the victims of tortious behavior to seek compensation from wrongdoers.

The imposition of common law liability would also help to promote uniformity because it may encourage manufacturers to opt for designs which are reasonable, feasible, and safe. Common law thus may bring greater uniformity than now exists, where manufacturers have the unregulated ability to build protective devices of all shapes, sizes, materials and designs, or to provide none at all. The preservation of common law actions therefore does not frustrate the purposes of Congress, but rather promotes them.

ARGUMENT

I. Common Law Claims Are Not Expressly Pre-empted by the Boat Safety Act

A. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Express Pre-emption

This Court has established a common sense framework to determine the pre-emptive scope of a federal act. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX*, 507 U.S. at 664. While the presence of an express pre-emption clause does not foreclose the possibility of implied pre-emption, the pre-emptive scope of an act will still be "governed by [its] express language" if it provides a "reliable indicium of Congressional intent with respect to state authority." *See Cipollone*, 505 U.S. at 517. The Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Cipollone*, 505 U.S. at 516 (emphasis added).

The first task in the analysis is thus to determine the "domain expressly pre-empted" by the terms of the Boat Safety Act. *See Medtronic*, 116 S. Ct. at 2250. The pre-emption clause of the Boat Safety Act provides in pertinent part that

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel

> or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

In order to fall under the domain expressly pre-empted, then, Petitioner's claim must be a law, regulation, or requirement which conflicts with "a regulation prescribed under section 4302" of the Act. It is undisputed that no regulation has ever been prescribed under section 4302 concerning propeller guards, however, and thus Petitioner's common law claims are not within the domain expressly pre-empted by the Boat Safety Act.

The Coast Guard submitted the issue of whether it should "move towards a federal requirement for some form of propeller guard" to an advisory board, which in turn appointed a subcommittee to study the issue. App. 76, 46. After this study, the advisory subcommittee recommended in 1989 that "[t]he U.S. Coast Guard *should take no regulatory action* to require propeller guards" at that time since it could not find a suitable universal design. App. 73 (emphasis added). The Coast Guard then internally adopted this recommendation to take no regulatory action, and never even began formal rulemaking activities under section 4302 of the Boat Safety Act or under the Administrative Procedure Act. App. 138.

Because this adoption did not meet the express requirements of section 4302 of the Boat Safety Act, it can not have pre-emptive effect.

A nearly identical situation existed in *Freightliner*, which involved claims that tractor-trailer manufacturers were negligent or had built defective products by not including antilock brake systems ("ABS") on their products. The defendant manufacturers argued that these claims were pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) ("Motor Vehicle Safety Act"). The Motor Vehicle Safety Act is similar in many respects to the Boat Safety Act, in that it pre-empts states from establishing "any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d)(1982). The Motor Vehicle Safety Act also has a savings clause nearly identical to the Boat Safety Act, which commands that "[c]ompliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c)(1982); *compare* 46 U.S.C. § 4311(c)(g). Importantly, the Motor Vehicle Safety Act also provided that the National Highway Traffic Safety Administration ("NHTSA"), which had the authority to issue regulations, had to formally issue pre-emptive regulations in accordance with the Administrative Procedure Act. 15 U.S.C. § 1392(b)(1982).

Pursuant to its regulatory authority, NHTSA promulgated braking regulations (known as "Standard 121"), which did not require ABS devices but set forth criteria for them if used. *See Paccar, Inc. v. NHTSA*, 573 F.2d 632

(9th Cir.), *cert denied*, 439 U.S. 862 (1978) (citing 36 Fed.Reg. 3817 [1971]). This enacted standard was subsequently suspended by a federal court in *Paccar*, based in part upon faulty fact-gathering and reliance on reports with chronic underreporting of claims. 573 F.2d at 632. NHTSA nevertheless stated that it would keep the regulations setting forth Standard 121 in place, so that manufacturers would know "what the agency still considers to be reasonable standards for minimum acceptable performance." *Freightliner*, 115 S. Ct. at 1486 (quoting 44 Fed. Reg. 46,849 [1979]). It also kept Standard 121 in the Code of Federal Regulations so that "the affected sections [could] most easily be reinstated" when the problems with the regulation's enactment were cured. *Ibid.* After the *Paccar* decision, and before the *Freightliner* decision, NHTSA also amended Standard 121 to clarify that ABS devices would not be required on trucks and trailers. *Freightliner*, 115 S. Ct. at 1486. Standard 121 was never finally reinstated by the time of *Freightliner*.

This Court held that, even though the federal agency actually enacted a regulation on point, *and* expressly maintained this standard to inform the industry of the agency's intent, *and* expressly stated its desire to reinstate the regulation, the suspended regulation did not have pre-emptive effect. The Court held that "[i]n the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all." *Freightliner*, 115 S. Ct. at 1486. This is strikingly similar to the situation at bar, since there is no promulgated safety standard which addresses propeller guards.

Indeed, the manufacturer's argument in *Freightliner* was even stronger than Respondent's position in this case

since the federal agency in *Freightliner* had actually undertaken formal regulatory action. Unlike the Coast Guard, NHTSA published its intent to promulgate a standard (32 Fed.Reg. 14,278 [1967]); published a notice of proposed rulemaking (34 Fed.Reg. 1055 [1969]; and published a final regulation with a future effective date (35 Fed.Reg. 10,368 [1970]). By contrast, the Coast Guard never even began formal rulemaking, as expressly required by the Boat Safety Act.

Since NHTSA followed the Administrative Procedure Act and properly enacted a regulation, a court was able to investigate the procedures by which the federal agency arrived at its regulatory decision. Here, by contrast, there has never been any regulation concerning propeller guards and thus there is nothing for a court to "invalidate." Moreover, since there were no notes or transcripts retained from the advisory subcommittee's meetings (*ex parte* or otherwise), a court cannot review the validity of its fact-finding as the *Paccar* court was able to do. This is a precise reason why the Boat Safety Act requires the actual promulgation of a regulation in order to pre-empt state safety standards which protect its citizens: to allow the judiciary to review the propriety of the agency's actions. *See* S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 1333, 1340 ("Any person who believes himself to be adversely affected by the promulgation of a standard [under the Boat Safety Act] may obtain judicial review in accordance with the Administrative Procedure Act").[6]

[6] This is also why FACA requires advisory committees to maintain transcripts and notes of its meetings: to allow the public and the courts to challenge the propriety of the subcommittee's advice and recommendations. 5 U.S.C. App. 2, § 10(b), (c).

Moreover the federal agency in *Freightliner* specifically kept the suspended regulation in place to apprise the public (and manufacturers) of what it considered to be acceptable standards of performance, and expressly stated that it did not wish ABS devices to be mandated on trucks. It also kept the regulations on the books with the express intent to revive them when possible. Thus although there was no enforceable regulation in place, and despite the court's ruling in *Paccar*, NHTSA expressly proclaimed that it did not wish to require ABS devices on trucks. Even so, *Freightliner* held that there was *no pre-emption*. The Coast Guard, by contrast, has never set any standards at all concerning propeller guards. There is thus even *less* reason to find pre-emption here than in *Freightliner*.

In an effort to distinguish the holding of *Freightliner*, Respondent maintains that section 4306 broadly pre-empts *all* state law – whether positive law or common law – unless it imposes a duty identical to a standard or regulation promulgated under section 4302. Cert. Opp. 21, n.5. Thus, the argument goes, if there is no federal standard at all, any state law duty cannot be identical to a federal standard and is thus pre-empted. This interpretation is contrary to the terms and purposes of the Boat Safety Act, however, as well as this Court's prior decisions.

First, section 4306 by its express terms pre-empts state law **only** when a federal standard or regulation is in

place; *it says nothing about pre-emption of state law in the absence of such a standard or regulation*. Congress thus expressly intended for the Coast Guard to promulgate actual regulations if it wished to create a potentially pre-emptive regulation. The Coast Guard has taken this position in regard to personal watercraft, for example. NBSAC appointed a personal watercraft subcommittee, and "[t]he basic question that was looked at was whether the Coast Guard should come up with new regulations or if it should be left to the states to regulate these craft." App. 129. After deliberations, the advisory subcommittee recommended that "personal watercraft regulation and legislation be relegated to State and Local jurisdictions." App. 130.

This intent is also clear from the legislative history of the Act, where Congress contemplated that "[a]ny person who believes himself to be adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340. Congress did not provide for any such relief in the *absence* of a promulgated standard, and it is presumed that Congress would not deprive aggrieved parties the right to challenge the validity of a pre-emptive *lack of regulation* in court. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). Congress simply gave the Coast Guard permissive authority to enact regulations if it so chose, and did not so much as intimate that there was pre-emption in the absence of such regulations.

Second, implying pre-emption from non-regulation is nonsensical because it would accord more pre-emptive effect to the **absence** of federal regulation than to regulation itself, a position at odds with the decisions of this Court. *See, e.g. Freightliner*, 115 S. Ct. at 1488 (lack of federal regulation precluded finding of pre-emption under similar statute and circumstances); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (implied "field" pre-emption only available when a "comprehensive federal scheme intentionally leaves a portion of the regulated field without controls," as opposed to the Boat Safety Act where Congress expressly set forth the method of creating pre-emptive regulations). This position is also contrary to the strong presumptions against pre-emption, which rest on such varied grounds as federalism; the preservation of historic police safety powers; and the recognition that Congress would not deny all tort remedies without comment. *See Cipollone*, 505 U.S. at 516 (Congress must show "clear and manifest purpose" to extinguish historic state police powers); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716 (1985); *Silkwood*, 464 U.S. at 251. This presumption against pre-emption is particularly strong where, as here, adoption of Respondent's position would ascribe to Congress an intent to pre-empt an entire field of state regulation. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature

of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained").[7]

The agency's decision not to take regulatory action on propeller guards was thus not a properly enacted "regulation prescribed under section 4302." Given the clear intent of Congress, and the rationale in *Freightliner*, the Coast Guard's adoption of an advisory recommendation not to undertake regulatory action does not have pre-emptive effect.

B. Common Law Is Not Within the Domain Expressly Pre-empted By the Boat Safety Act

A further reading of section 4306 confirms that common law is not within the domain expressly pre-empted by the Boat Safety Act. Simply stated, the pre-emption clause does not provide that "common law" actions are pre-empted. Congress has repeatedly shown its ability to

---

[7] As so eloquently stated a half century ago,

> Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion).

expressly refer to "common law" when it intends to include it within the scope of a pre-emption clause. *Compare, e.g.* Copyright Act of 1976, 17 U.S.C. § 301(a)(1977) (pre-empting rights "under the common law or statutes of any State"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e)(1989)(pre-empting any "State constitution, statute, court decree, common law, rule, or public policy"); *see also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1)(1985)(pre-empting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). Congress instead chose the terms "laws, regulations and requirements," to express its pre-emptive intent.

An ordinary reading of the pre-emption clause confirms, in other several distinct ways, that Congress intended only to pre-empt state legislative or administrative actions and not common law. Primarily, "laws, regulations, and requirements" are all terms which connote legislative or executive decision-making processes, as opposed to common law liability. These words were chosen by Congress because, the legislative record reflects, the Act was intended to pre-empt state enactments regarding boat numbering; boat capacities; and safe powering standards. MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 101. "[I]f Congress intended to preclude all common-law causes of action, it chose [ ] singularly odd word[s] . . . with which to do it." *Medtronic*, 116 S. Ct. at 2251 (plurality opinion).

Indeed, the terminology used throughout the entire pre-emption provision confirms that Congress, when it

chose its terms for the pre-emption provision, was intent on pre-empting state legislative or administrative actions instead of common law. The Boat Safety Act's pre-emption provision provides that "a State or a political subdivision of a State" may not "establish, continue in effect, or enforce" a law or regulation which establishes a "performance or other safety standard." 46 U.S.C. § 4306. Each of these clauses, in their common parlance, indicate legislative or administrative enactments instead of the tort system:

> * Petitioners are not asking a "State or a political subdivision of a State" to do anything in this case, but are rather asking a federal district court to allow the application of the forum's long-standing common law.
>
> * It is a stretch of grammar to suggest that the imposition of historic common law is an attempt to "establish, continue in effect, or enforce a law or regulation." Rather, Petitioners merely rely on "the general duty of every manufacturer to use due care to avoid foreseeable dangers in its product." *Medtronic*, 116 S. Ct. at 2258.
>
> * Throughout the Act, the term "standard" refers to regulatory standards the Coast Guard may enact under section 4302. *See* 46 U.S.C. §§ 4302(a)(1), (a)(2); 4304; 4311(f)(1), (f)(2). It is a bedrock principle of statutory interpretation that "a word is presumed to have the same meaning in all subsections of the same statute." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983). Thus it may be presumed that Congress intended the term "standard" to refer to state legislative or administrative enactments, especially when that term is used in conjunction with "laws, regulations and requirements."

This result is entirely consistent with previous holdings of this Court, which recognize that the express pre-emption of state "laws or regulations" does not necessarily mean that state tort actions are pre-empted, because the two are not identical in nature or effect. *See, e.g. Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 626-628 (1996)(variations in state tort remedies have "long been deemed compatible with federal maritime interests," and the lack of a federal comprehensive tort recovery regime in the federal act suggests that state tort actions are not pre-empted); *Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions."); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990)(state minimum wage laws, child labor laws, and tort claims would not be pre-empted by federal law at nuclear power plants even though they may affect resource allocation decisions and may alter radiological safety policies); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988)("[t]he effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an award provision. . . . [T]he permission of incidental regulation is consistent with the preclusion of direct regulation. . . . "); *Silkwood*, 464 U.S. at 256 (negligence or strict liability awards not pre-empted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards . . . ").

Common law claims are thus not within the domain expressly pre-empted by section 4306 of the Boat Safety Act.

C. The Savings Clause Clearly Establishes that Common Law Claims Are Not Within The Domain Expressly Pre-empted.

Congress also made clear, through the savings clause of the Boat Safety Act, that it did not intend to include common law actions within the domain pre-empted by the Act. When considering the bill which would ultimately become the Boat Safety Act, a congressional subcommittee was asked to add an express savings provision to clarify that the Act "does not preempt state or common law." MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88. The savings clause was then added into the bill by the subcommittee in response to such concerns, "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. REP. No. 248, 92nd Cong., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352.

Congress therefore provided in the Boat Safety Act that "[c]ompliance with [the Act] does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The express intent of Congress in enacting this Savings Clause was therefore to allow product liability suits to proceed, without manufacturers arguing

that compliance with even express federal law pre-empted such actions.[8]

It is also clear from the legislative history that common law claims are not pre-empted in the *absence* of a federal regulation concerning the safety feature in issue. The Senate subcommittee, in considering the bill, was specifically asked to clarify that the "failure of the (Coast Guard) to promulgate a standard shall not be admissible in a private proceeding," to "preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition." MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88. In response to this request, the congressional subcommittee stated that "[o]f course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352.

Congress was thus squarely presented with the very question which exists in this case: whether the lack of an enacted standard should have preclusive effect. At this point, Congress did not reply that common law claims were to be pre-empted in the absence of a federal standard on point. Rather, the Senate report stated that "[o]f

---

[8] In *Freightliner*, this Court did not reach the question of whether the Motor Vehicle Safety Act's savings clause preserved the plaintiff's common law claims since "no federal safety standard exist[ed]" to create pre-emption. 115 S. Ct. at 1487.

course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." Thus when Congress was presented with that very question, it did not provide a clear and manifest intent to pre-empt common law actions in the absence of an enacted federal regulation. Instead, it added an express savings clause and stated that the rules of evidence would govern such matters' admissibility.

Congress therefore established in the savings clause of the Boat Safety Act that it expressly had considered "common law" in this piece of legislation. Instead of including it in the pre-emption clause, though, Congress expressly preserved common law from pre-emption by including it in the savings clause. Congress' decision to forego listing "common law" in the Boat Safety Act's pre-emption clause, coupled with its express *inclusion* of that term in the savings clause, is the best evidence of Congress' intent in regard to common law. That intent, as set forth in the express terms of the Boat Safety Act, is to save common law liability from pre-emption. *Compare, e.g., Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." [quoting *Russello v. United States*, 464 U.S. 15, 23 (1983)]).

For its part, the Eleventh Circuit correctly found that Petitioners' common law claims were not expressly pre-empted but then incorrectly held that the claims were impliedly pre-empted. Pet. App. A24. In arriving at this conclusion, the lower court adopted Brunswick's argument that the savings clause would only save a tort of commission (negligent installation of a guard) but not a tort of omission (failure to provide a guard). Cert. Pet. 422. This position is contrary to the text of the Act, however, because section 4311(g) contains no such distinction. Moreover, since no federal requirement prohibits or requires propeller guards, Respondent complies with the Act whether it provides a guard ("commission") or not ("ommission"). That "compliance" does not relieve Respondent from common law under the express terms of the Boat Safety Act. 46 U.S.C. § 4311(g). There is thus no logical or textual reason to imply an unstated limitation into the terms chosen by Congress when adding the savings clause.

II. Common Law Claims Are Not Impliedly Pre-empted by the Boat Safety Act

A. The Boat Safety Act Provides A "Reliable Indicium of Congressional Intent with Respect to State Authority," Raising an Inference that Further Implied Pre-emption is Inapposite

Congressional purpose is the "ultimate touchstone" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 [1963]). The best evidence of Congress'

pre-emptive intent is the "plain wording" of the legislation itself. *CSX*, 507 U.S. at 664. Therefore, when Congress expressly sets forth the pre-emptive scope of an act, there is an inference that Congress has spoken conclusively on the pre-emption question and that further pre-emption should not be found by implication. *Freightliner*, 115 S. Ct. at 1488. Thus if the act provides a "reliable indicium of Congressional intent with respect to state authority," its pre-emptive scope may be "governed entirely" by the express text of the Act. *See Cipollone*, 505 U.S. at 517; *see also Freightliner*, 115 S. Ct. at 1488.

The text of the Boat Safety Act provides just such a reliable indicium of Congressional intent with respect to state authority, since Congress has clearly defined what it intended to pre-empt (46 U.S.C. § 4306); clearly set forth the steps which the Coast Guard must undertake to exercise potential pre-emption (46 U.S.C. § 4302); and clearly set forth what it intended to save from pre-emption (46 U.S.C. § 4311[g]). There is therefore no need to imply further pre-emption. *Expressio unius est exclusio alterius. Cipollone*, 505 U.S. at 517. Indeed, this invitation for imprecise guesswork as to Congress' intent is exactly why implied pre-emption is eschewed in the face of an express pre-emption clause.

This Court has commanded through is precedent that the terms of the federal act are paramount in determining its pre-emptive scope. The implication of pre-emption which Brunswick attempts to draw, and which the lower courts adopted, must therefore fail.

B. It is Not Impossible for Brunswick to Comply with Both the Boat Safety Act and Common Law

In any event, the Lewis Family's common law claims survive implied pre-emption analysis. First, Brunswick may comply with both federal and state law and thus there is no implied "conflict pre-emption." As previously noted, the Coast Guard has never propounded a formal regulation requiring *or disallowing* propeller guards on motor boats under section 4302. Rather, it merely took a preliminary look at the issue and adopted an advisory recommendation not to begin regulation of the issue at the time. Manufacturers such as Brunswick may therefore include guards or not, *free of any federal regulation on the subject whatsoever*, and without any guidance or mandate from enacted Boat Safety Act regulations. Brunswick thus complies with the federal law whether it provides a propeller guard or not, and a finding of common law tort liability will not encourage Brunswick to violate any federal law.

A similar implied pre-emption scenario was rejected in *Freightliner*, where this Court stated that

> Petitioners' pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. . . . [I]t is not impossible for petitioners to comply with both federal and state law because *there is simply no federal standard for a private party to comply with.* Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 *imposes no requirements either requiring or prohibiting* ABS systems, tractor-trailer manufacturers are free to obey state

> standards concerning stopping distances and vehicle stability.

Freightliner, 115 S. Ct. at 1488 (emphasis added).

C. Petitioners' Common Law Claims Do Not Frustrate the Purposes of Congress

1. There Is No Federal Propeller Guard Mandate To Frustrate

Likewise, the lack of any federal propeller guard regulation promulgated under the Boat Safety Act negates any argument that the imposition of common law liability will frustrate Congress' pre-emptive intent. Congress expressly intended to have the relevant agency prescribe regulations in accordance with the Boat Safety Act if it wished to flex its pre-emptive muscle. Since the agency chose not to follow this express intent of Congress, it is illogical to imply that Congress' intent has been thwarted.

Furthermore, as this Court recognized in *Freightliner*:

> [W]e cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a promulgated safety standard, *the Act simply fails to address the need for ABS devices at all*. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. *A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.*

Freightliner, 115 S. Ct. at 1488 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 [1941]) (emphasis added).

The Eleventh Circuit held that Petitioner's common law claims were impliedly pre-empted, reasoning that Congress had in effect mandated that only the Coast Guard should regulate the entire field of boat safety. As stated above, this argument overlooks Congress' express mandate to the Coast Guard to take affirmative regulatory action if it wished to create a pre-emptive rule. 46 U.S.C. § 4306; *see also* S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1340 (Congress "requires certain actions by the [Coast Guard] in the development of safety standards," including compliance with both section 4302 of the Boat Safety Act and the Administrative Procedure Act). The Coast Guard has thus recognized that, absent an affirmative regulation on its behalf, state law remains extant. *See* App. 129-130 (relegating personal watercraft regulation and legislation to state and local jurisdictions in the absence of federal action). The legislative history also establishes that Congress clearly intended common law actions to remain viable in the absence of any federal regulation. *See* MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 88; S. REP. No. 248, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 1333, 1352 (clarifying that the agency's failure to enact a relevant standard may or may not be admissible in a private proceeding, depending on the jurisdiction's rules of evidence). The implication of pre-emption in this case therefore flies in the face of the Boat Safety Act's express terms and legislative history.

The lower court's interpretation also gives greater pre-emptive weight to the lack of regulation than to a

properly enacted regulation, in contradiction to this Court's precedent. *See, e.g., Freightliner*, 115 S. Ct. at 1488 (lack of federal regulation precluded finding of implied "frustration" pre-emption); *Puerto Rico Dept. of Consumer Affairs*, 485 U.S. at 503-04 (implied "field" pre-emption only available when a federal scheme intentionally leaves a portion of the regulated field "without controls," as opposed to here where Congress expressly set forth the method of creating pre-emptive regulations); *Cipollone*, 505 U.S. at 516 (Congress must show "clear and manifest purpose" to extinguish historic state police powers); *Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

2. Common Law Promotes Congressional Purposes

The manifest purpose of the Boat Safety Act is to promote safety. S. REP. No. 248, 92nd Cong., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1333. A secondary goal was "encouraging uniformity among boating laws," *Id.* at 1334; it did not state that it was "mandating" such uniformity. Respondent nonetheless latches on to "uniformity" to urge that Petitioner's claims would frustrate the purposes of Congress. Common law actions may help promote the uniformity of product designs in the absence of agency regulation, however, and thus the saving of common law does not undermine this secondary congressional purpose.

Since there is currently no regulation in place that addresses propeller guards at all, manufacturers may

either provide propeller guards or not. If manufacturers choose to provide propeller guards, moreover, there is no regulation that sets forth whether this protective device should be a shroud, nozzle, screen, or some other configuration. There is no regulation which sets forth what materials these protective devices should, should not, or may contain; there are no regulations as to performance, construction or testing standards; etc.

The situation that exists now, and which is championed by Brunswick, allows manufacturers the unfettered discretion to do whatever they want, however they want, free from regulation on the subject. *This is the least uniform situation possible.* Common law actions, by contrast, could help bring light to this lacuna by providing input as to what are, or are not, reasonable designs. Common law might promote uniformity in comparison to the present state of affairs and, more importantly, it certainly would not undermine uniformity in the absence of a particular federal propeller guard standard.[9]

Moreover, Congress expressly provided that "[c]ompliance with [the Boat Safety Act] does not relieve a person from liability at common law or under state

---

[9] Congress originally had to authorize national standards because at least one-fourth of manufacturers were not complying with the industry's self-imposed minimum safety standards under the old legislative regime. MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 92ND CONG., 1ST SESS., HEARING (March 22, 1971), 82. Congress' policy decision in enacting the Boat Safety Act could therefore not have been to let manufacturers run wholly free from regulatory *and* common law protections.

law." 46 U.S.C. § 4311(g). Thus while uniformity is certainly one of the aims of the Boat Safety Act, Congress expressly provided that States could exercise historic common law powers in derogation of strict "uniformity" to allow for the compensation of tort victims. If the consequence of this preservation of common law or police power was a lessening of uniformity (which Petitioners deny), it was an "evil" that Congress apparently chose to accept. Indeed it is illogical to conclude that the preservation of common law would frustrate congressional purposes, when Congress itself expressly provided for the continued vitality of common law.

In sum, Congress' policy decision in enacting the Boat Safety Act could not have been to allow the victims of tortious behavior to go wholly uncompensated, and the presumption is that Congress did not so intend. *See, e.g. Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). At the very least, Congress has not shown a "clear and manifest" intent to preclude this historical state power in the context of motorboat propeller safety.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed and remanded for a trial on the merits.

Respectfully submitted.

DAVID E. HUDSON*
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
Post Office Box 1564
Augusta, Georgia 30903
(706) 722-4481

R. BENJAMIN HOGAN, III
HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203
(205) 324-5635

Counsel of Record

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

46 U.S.C. § 4302

§ 4302. Regulations

(a) The Secretary may prescribe regulations –

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard –

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, life-saving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless

the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things –

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations referred to in clauses (1)-(3) of this subsection.

(d) Section 8903 of this title does not apply to a vessel being operated for bona fide dealer demonstrations provided without fee to business invitees. However, if on the basis of substantial evidence, the Secretary

decides under this section that requiring vessels so operated to be under the control of licensed individuals is necessary for boating safety, then the Secretary may prescribe regulations requiring the licensing of individuals controlling these vessels in the same manner as provided in chapter 89 of this title for individuals in control of vessels carrying passengers for hire.

* * *

46 U.S.C. § 4306

§ 4306. Federal preemption

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

* * *

46 U.S.C. § 4311

§ 4311. Penalties and injunctions

(a) A person willfully operating a recreational vessel in violation of this chapter or a regulation prescribed

under this chapter shall be fined not more than $5,000, imprisoned for not more than one year, or both.

(b) A person violating section 4307(a)(1) of this title is liable to the United States Government for a civil penalty of not more than $2,000, except that the maximum civil penalty may be not more than $100,000 for a related series of violations. When a corporation violates section 4307(a)(1), any director, officer, or executive employee of the corporation who knowingly and willfully ordered, or knowingly and willfully authorized, a violation is individually liable to the Government for the penalty, in addition to the corporation. However, the director, officer, or executive employee is not liable individually under this subsection if the director, officer, or executive employee can demonstrate by a preponderance of the evidence that –

(1) the order or authorization was issued on the basis of a decision, in exercising reasonable and prudent judgment, that the defect or the nonconformity with standards and regulations constituting the violation would not cause or constitute a substantial risk of personal injury to the public; and

(2) at the time of the order or authorization, the director, officer, or executive employee advised the Secretary in writing of acting under this clause and clause (1) of this subsection.

(c) A person violating any other provision of this chapter or other regulation prescribed under this chapter is liable to the Government for a civil penalty of not more than $1,000. If the violation involves the operation of a vessel, the vessel also is liable in rem for the penalty.

(d) When a civil penalty of not more than $200 has been assessed under this chapter, the Secretary may refer the matter of collection of the penalty directly to the United States magistrate of the jurisdiction in which the person liable may be found for collection procedures under supervision of the district court and under an order issued by the court delegating this authority under section 636(b) of title 28.

(e) The district courts of the United States have jurisdiction to restrain a violation of this chapter, or to restrain the sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation into the United States, of a recreational vessel or associated equipment that the court decides does not conform to safety standards of the Government. A civil action under this subsection shall be brought by filing a petition by the Attorney General for the Government. When practicable, the Secretary shall give notice to a person against whom an action for injunctive relief is contemplated and provide the person with an opportunity to present views and, except for a knowing and willful violation, shall provide the person with a reasonable opportunity to achieve compliance. The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.

(f) A person is not subject to a penalty under this chapter if the person –

(1) establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel or associated equipment does not conform with the applicable safety standards of the Government or that the person was not advised by

the Secretary or the manufacturer of that vessel, equipment or component that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public; or

(2) holds a certificate issued by the manufacturer of that recreational vessel or associated equipment to the effect that the recreational vessel or associated equipment conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel or associated equipment does not so conform.

(g) Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

---

(5)

No. 97-288

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS, AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE RESPONDENT

DANIEL J. CONNOLLY
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

JAMES W. HAGAN
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

KENNETH S. GELLER*
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

* *Counsel of Record*

BEST AVAILABLE COPY

58 pp

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, expressly rejected such a requirement on the grounds that it would be contrary to the interests of boat safety and not economically justified.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, respondent Brunswick Corporation refers to and incorporates by reference the list of its nonwholly owned subsidiaries submitted with its Brief for the Respondent in Opposition (at ii) in this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (I)

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The Boat Safety Act 2

B. Federal Preemption Under the Boat Safety Act 5

C. The "Savings Provision" of the Boat Safety Act . . . 7

D. The Coast Guard's Decision That Propeller Guards Should Not Be Required 8

E. The Present Case 13

INTRODUCTION AND SUMMARY OF ARGUMENT . . . 14

ARGUMENT 16

I. PETITIONERS' COMMON LAW CLAIMS ARE EXPRESSLY PREEMPTED BY THE BOAT SAFETY ACT 17

A. The Boat Safety Act's Preemption Provision Bars State Laws That Are "Not Identical" to a Coast Guard Regulation 17

B. The Preemption Provision of the Boat Safety Act Includes Within Its Scope State Common Law Claims 22

C. The "Savings Provision" of the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Preemption 29

TABLE OF CONTENTS — Continued

Page

II. PETITIONERS' COMMON LAW CLAIMS ARE IMPLIEDLY PREEMPTED BY THE COAST GUARD'S DECISION THAT PROPELLER GUARDS SHOULD NOT BE REQUIRED 33

A. Petitioners' Attempt to Second-Guess the Coast Guard's Rejection of a Propeller Guard Requirement is Barred by the Supremacy Clause 33

B. Implied Conflict Preemption is Fully Applicable Under the Boat Safety Act 35

C. Petitioners' Common Law Claims Would Frustrate the Purpose of the Coast Guard's Decision On Propeller Guards and Would Undermine Congress' Goal of Creating Uniform National Standards and Requirements 37

D. The Savings Provision in the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Implied Preemption 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) 12

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) 41

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 32

Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102 (1987) 24

Atherton v. *Federal Deposit Ins. Corp.*, 117 S. Ct. 666 (1975) 24

Beech v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991) 13

Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947) 41

BMW of North Am., Inc. v. *Gore*, 116 S. Ct. 1589 (1996) 25

Boggs v. *Boggs*, 117 S. Ct. 1754 (1997) 37

Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) 41

Brown v. *Hotel & Restaurant Employees*, 468 U.S. 491 (1984) 36

Carstensen v. *Brunswick Corp.*, 49 F.3d 430, cert. denied, 116 S. Ct. 182 (1995) 21, 32, 35

Caterpillar, Inc. v. *Williams*, 482 U.S. 386 (1987) 32

Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 24, 44

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) . . . . . *passim*

TABLE OF AUTHORITIES — Continued

Page(s)

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 415 (1971) 21

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 23-24

Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 35

Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 20

Elliott v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991) 12

English v. *General Elec. Co.*, 496 U.S. 72 (1990) . . 16, 26-27

Farner v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993) 35

Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 16

Fitzpatrick v. *Madonna*, 424 Pa. Super. 473, 623 A.2d 322 (1993) 13

Freightliner Corp. v. *Myrick*, 514 U.S. 280 (1995) . . . . *passim*

Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 32

Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 26-27

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 16, 34

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 24

Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990) 37

TABLE OF AUTHORITIES — Continued

Page(s)

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 25

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 37

Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 16

Malone v. *White Motor Corp.*, 435 U.S. 497 (1978) 36

Medtronic, Inc. v. *Lohr*, 116 S. Ct. 2240 (1996) . . . . . *passim*

Moore v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994) 35

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 45

Moss v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) 35

Mowery v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991) 11, 35

Mulhern v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1989) 31

Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) 45

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 24

Norfolk & W.R. Co. v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) 23

Northwest Cent. Pipeline Corp. v. *Kansas Corp. Comm'n*, 489 U.S. 493 (1989) 37

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 26, 45

Paccar, Inc. v. *NHTSA*, 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862 (1978) 41-42

TABLE OF AUTHORITIES — Continued

Page(s)

Pacific Gas & Elec. Co. v. *State Energy Comm'n*, 461 U.S. 190 (1983) 27

Parker v. *Outboard Motor Corp.*, No. J90-0011(L) slip. op. (S.D. Miss. Feb. 28, 1991) 35

Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 44

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 32

Pree v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 510 U.S. 815 (1993) 12

Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495(1988) 40-41

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) . . 28-29, 41

Rice v. *Rehner*, 463 U.S. 713 (1983) 16

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 17

Ryan v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997) 21, 35

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 15, 24

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 16

Shenker v. *Baltimore & Ohio R.R.*, 374 U.S. 1 (1963) 24

Sheridan v. *United States*, 487 U.S. 392 (1988) 25

Shield v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) 35

Shields v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) 35

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 26-27

TABLE OF AUTHORITIES — Continued

Page(s)

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 15, 45

United States v. *Monsanto*, 491 U.S. 600 (1989) 32

Yamaha Motor Corp., U.S.A. v. *Calhoun*, 116 S. Ct. 619 (1996) 17, 26

Constitutional Provision, Statutes, and Regulations

U.S. Const. art. VI, cl. 2 . . . . . 1, 16

5 U.S.C. § 551(13) 21

15 U.S.C. § 1381 19

15 U.S.C. § 1461 37

21 U.S.C. § 360k(a) 25

21 U.S.C. § 360k(b) 26

28 U.S.C. § 1254 1

28 U.S.C. § 1331 24

42 U.S.C. § 2018 27

42 U.S.C. § 2021(b) 27

42 U.S.C. § 2021(k) 27

46 U.S.C. §§ 4301-4311 2

46 U.S.C. § 4302 . . . . . *passim*

46 U.S.C. § 4302(a) 4

46 U.S.C. § 4302(c) 4

46 U.S.C. § 4302(c)(3) 40

46 U.S.C. § 4302(c)(4) 4, 9

46 U.S.C. § 4305 . . . . . *passim*

46 U.S.C. § 4306 . . . . . *passim*

TABLE OF AUTHORITIES — Continued

Page(s)

46 U.S.C. § 4311(g) . . . . . *passim*
46 U.S.C. § 13110 5
46 U.S.C. § 13110(a) 5
46 U.S.C. § 13110(b)(1) 5
Pub. L. No. 92-75, 85 Stat. 213 (1971) 2-4
N.J. Stat. Ann. §§ 2A:58C-1-58C-7 26
Ohio Rev. Code Ann. §§ 2307.71-2307.80 26
33 C.F.R. Subchapter S 8
33 C.F.R. Part 175 9
33 C.F.R. Part 183 8
49 C.F.R. § 1.46(n)(1) 3

Other Materials

H.R. Rep. No. 92-324, 92d Cong., 1st Sess. (1971) . . . *passim*

S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971) . . . . . *passim*

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) . *passim*

Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 3, 6-7

117 Cong. Rec. H6490 (daily ed. July 8, 1971) 2

117 Cong. Rec. H7362 (daily ed. July 21, 1971) 8

36 Fed. Reg. 15764 (1971) 8, 18

38 Fed. Reg. 6914 (1973) 8

53 Fed. Reg. 33210 (1988) 22

TABLE OF AUTHORITIES — Continued

Page(s)

53 Fed. Reg. 43070 (1988) 22
54 Fed. Reg. 15068 (1989) 22
54 Fed. Reg. 42138 (1989) 22

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 107 F.3d 1494. The district court's order granting respondent's motion for summary judgment (Pet. App. A26-A32) is reported at 922 F. Supp. 613.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1997, and a petition for rehearing was denied on May 15, 1997. The petition for a writ of certiorari was filed on August 13, 1997, and was granted on November 14, 1997. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 9 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4305, provides:

> If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter.

Section 10 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4306, provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous

conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 40 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4311(g), provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

STATEMENT

A. The Boat Safety Act

The Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. §§ 4301-4311 ("Boat Safety Act" or "Act"), was enacted by Congress to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve these goals by, among other means, "encouraging and assisting participation by the several States, the boating industry, and the boating public in development of more comprehensive boating safety programs" and by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Before the Boat Safety Act was enacted, the existing federal statutes governing boat safety — the Motorboat Act of 1940 and the Federal Boating Act of 1958 — did "not meet [the] current requirements of safe boating." H.R. Rep. No. 92-324, 92d Cong., 1st Sess. 9 (1971) ("House Report"). The Motorboat Act of 1940 imposed limited requirements for "certain safety equipment and measures such as life preservers, [and] fire extinguishers * * *." S. Rep. No. 92-248, 92d Cong., 1st Sess. 13 (1971) ("Senate Report"). The narrow scope of this statute and the "inflexibility of the statutory requirements" undermined its utility at a time when boat usage was growing rapidly in the late 1960s and early 1970s. *Id.* at 13-14. The Federal Boating Act of 1958 was even narrower — "primarily a boat numbering statute." House Report at 9; see also 117 Cong. Rec. H6490 (daily ed. July 8, 1971) (statement of Rep. Monagan) (noting the "limited scope" of the 1940 and 1958 statutes).

With "40 million participants boating on over 25 million square miles of waters" in 1971, Senate Report at 13, Congress concluded that a more comprehensive boat safety scheme was needed. Toward that end, and in particular to "reduce the level of fatalities now resulting from boating mishaps," Congress enacted the Boat Safety Act to establish "a coordinated national boating safety program." *Id.* at 1, 13.

The Boat Safety Act had three principal components. First, the Act provided for the establishment of "a standard numbering system for vessels" to be administered by the States under the authority and with the approval of the United States Coast Guard.[1] See Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222 ("Numbering of Certain Vessels"). This program was a reiteration and expansion of the "numbering system required by the 1958 Act." *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("House Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard); see also Senate Report at 6.

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the Boat Safety Act authorized and funded "State boating safety programs," under the auspices of the Coast Guard, that were "directed at implementing and supplementing" the Act. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 224-227 ("State Boating Safety Programs"). Pursuant to this scheme, the Coast Guard could approve and fund a state boating safety program if the program provided for, among other things, patrol and law enforcement activities, as well as "boating safety education." *Id.* § 26(a). The Coast Guard was acutely aware that it needed the assistance of state

---

[1] The statute vests authority under this and all of its other provisions in the Secretary of Transportation. The Secretary, in turn, has delegated to the Coast Guard the responsibility of "[c]arrying out the functions vested in the Secretary by the [Boat Safety Act]." 49 C.F.R. § 1.46(n)(1). Accordingly, we refer to the Coast Guard rather than to the Secretary in discussing the responsibilities of the Department of Transportation under the Act.

and local authorities to patrol navigable waters and to enforce boat safety laws and regulations. See House Hearings at 57 ("we look to State and local jurisdictions to enforce those safety requirements with which the operator must comply" and "[f]rom a purely economic view point, it is less costly to enforce the law on internal waters with State and local officials") (statement of Rear Admiral McClelland); *id.* at 71 ("The Coast Guard has stated that enforcement should be a State and local police function") (statement of Rep. Clark).

The third and most significant component of the Boat Safety Act mandated the creation of a comprehensive program of national boat construction and performance standards and requirements for associated equipment. Section 5(a) of the Act (as amended and codified at 46 U.S.C. § 4302(a)) states that the Coast Guard may prescribe regulations:

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard —
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance;
>
> (2) requiring the installation, carrying, or use of associated equipment * * *.

In considering whether to adopt a standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Council"), 46 U.S.C. § 4302(c)(4),[2] a group of experts

---

[2] As part of the standard-setting process under the Act, the Coast Guard must also (46 U.S.C. § 4302(c)):

> (1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;
>
> (2) consider relevant available recreational vessel safety standards, statistics, and data, * * *; [and]

(continued...)

and other persons interested in boat safety established under the terms of the "State Boating Safety Programs" component of the Act, see 46 U.S.C. § 13110. One third of the 21 members of the Council must be state boat safety administrators.[3]

B. Federal Preemption Under the Boat Safety Act

The Coast Guard's plenary authority under the Boat Safety Act to require manufacturers to comply with "national construction and performance standards for boats and associated equipment," Senate Report at 15, is buttressed by a sweeping provision for federal preemption of state law. Congress decided that the standards and requirements established by the Act must be nationally uniform (*id.* at 14): "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."

Indeed, in the congressional deliberations over the enactment of the Boat Safety Act, witnesses repeatedly emphasized the pressing "need for uniformity in standards." House Report at 29. For example, John H. Reed, Chairman of the National Transportation Safety Board, stated (*ibid.*):

> All but three States now have boating legislation, and a number of States have boating laws which are more comprehensive than the present Federal laws governing boat registration and safety. * * * Unless the Federal Government establishes a uniform

---

[2] (...continued)

> (3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence * * * but * * * may require [such] compliance or performance, to avoid a substantial risk of personal injury to the public * * *.

[3] The members of the NBSAC, who are appointed by the Secretary of Transportation, must have expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* § 13110(b)(1).

> minimum safe-boating program, the lack of uniformity between States will pose an increasing burden on the boating public. The mobility of trailered boats, and contiguity of some waters to several States now present serious problems to law-abiding recreational boaters.

See also House Hearings at 61 ("several States are developing requirements of their own in law which are varied and it is quite important for both the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland); *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong. 1st Sess. 101 (1971) ("Senate Hearing") ("A proliferation of dissimilar standards would give the manufacturer — and the boatman for that matter — an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now") (statement of Rep. Monagan).

To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (Senate Report at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of [the Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The preceding section of the Act (46 U.S.C. § 4305) authorizes the Coast Guard to "issue an exemption" from the uniform national construction and performance standards and equipment requirements adopted under the statute, but only if "recreational vessel safety will not be adversely affected."

Section 4306 thus insures that boat manufacturers are not subject to "widely varying local requirements." Senate Report at 20. By mandating that any state laws, regulations, or requirements be "identical" to regulations issued by the Coast Guard, the preemption clause is exceptionally broad. Indeed, the House Report emphasized (at 11) that this provision "preempts the field on boating standards or regulations."[4]

Congress' clear decision to preempt the "field" of boat construction standards and equipment requirements contrasts sharply with its emphasis on state involvement in other parts of the Act (see pages 2-5, *supra*). "While Federal preemptive measures are necessary to assure uniformity of safety standards, quite the contrary is true of enforcement and education." House Hearings at 57 (statement of Rear Admiral McClelland). In those areas, "State participation is vital." Senate Hearing at 43 (statement of Admiral Chester R. Bender, Commandant of the Coast Guard). As the Senate Report on the Act concluded (at 13), "the very magnitude of the boating safety problem * * * suggests that an effective program of education, enforcement, and assistance must actively involve the States."[5]

C. The "Savings Provision" of the Boat Safety Act

Late in the course of congressional consideration of the Boat Safety Act, the Senate Commerce Committee added a so-called "Savings Provision" to the end (Section 40) of the Senate version (S.

---

[4] In cases where it is necessary to address local "uniquely hazardous conditions or circumstances," 46 U.S.C. § 4306, the preemption provision allows the States to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements." See Senate Report at 20. Consistent with the "field" preemption intended by Congress over construction and performance standards and equipment requirements, however, the statute reserves to the Coast Guard a "right of disapproval" over even these limited state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

[5] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

696). See Senate Report at 31. This provision, as later amended and codified, states (46 U.S.C. § 4311(g)): "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." The Senate Report explained (at 32) that the

> purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

Thereafter, the Conference Committee agreed to the Senate's "Savings Provision" amendment. The only discussion of the amendment in the House was a brief colloquy on the House floor in which Rep. Grover described the provision as "basically [a] technical amendment[] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. H7362 (daily ed. July 21, 1971). After this fleeting discussion, the Senate's "technical" amendment "was concurred in" by the House (*ibid.*), and the Act was adopted.

D. The Coast Guard's Decision That Propeller Guards Should Not Be Required

Immediately after passage of the Boat Safety Act, the Secretary of Transportation exercised the authority granted by Section 9 of the Act (46 U.S.C. § 4305) to exempt temporarily — until the Coast Guard adopted federal boat construction and performance standards and equipment requirements — all state boat safety laws, regulations, and requirements "in effect on the effective date of the Federal Boat Safety Act of 1971." 36 Fed. Reg. 15764, 15765 (1971). Two years later, after it had promulgated federal standards and requirements, the Coast Guard rescinded the Secretary's general exemption of state laws, regulations, and requirements. 38 Fed. Reg. 6914 (1973).

In subsequent years, the Coast Guard has promulgated a host of federal boat and motor design standards and other requirements for marine equipment. See 33 C.F.R. Subchapter S. In particular, the Coast Guard has adopted a number of "Equipment Requirements" and design standards in 33 C.F.R. Parts 175, 183, including design

requirements for marine motors, boat flotation materials, electrical systems, fuel systems, personal floatation devices, visual distress signals, and ventilation systems. See *id.* Part 175 (Subparts B-D), Part 183 (Subparts D-L).

In the late 1980s, the Coast Guard considered whether to adopt an equipment requirement that would compel manufacturers to install propeller guards on their boat engines. As directed by Section 4302(c)(4), the Coast Guard consulted with the NBSAC and requested that the Council study the issue. The Coast Guard's charge to the Council in April 1988 asked it to:

- Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

- Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report"), J.A. 75. In particular, the Coast Guard asked the Council whether there should be "a federal requirement for some form of propeller guard." J.A. 76; Pet. App. A6. The Coast Guard also asked the Council to consider and assess several different "propeller guard designs." J.A. 76.

In response to the Coast Guard's request, the NBSAC established a Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. J.A. 46. The Subcommittee, which was chaired by a state official responsible for the enforcement of boat safety laws and which included a Coast Guard representative (*ibid.*), received and reviewed files and information supplied by the Coast Guard. J.A. 47. In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *id.* at 47, 77-87, such as representatives of boat manufac-

turers and counsel representing injured persons in product liability actions (including counsel for petitioners in this case). *Id.* at 47-50.[6]

During its extensive fact-finding activities conducted over 18 months, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. J.A. 88-94. In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 47-48.

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." J.A. 92. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Ibid.* Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 56), the number of propeller incidents was small compared to the total number of boating accidents. *Id.* at 57, 95-101; see also *id.* at 72 ("the propeller itself is the sole factor in only a minority of impacts").

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 73. Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for *any* pleasure craft traveling at normal operating speeds ("propeller guards affect boat operation adversely at speeds greater than 10 miles per hour" (Pet. App. A7)), serious steering and handling problems caused by propeller guards (along with increased drag, loss of speed, and dramatically reduced power and fuel efficiency), and increased safety problems posed by such devices (such as the new and increased

[6] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs to advocate the use of propeller guards. J.A. 77-80.

impact hazard created by propeller guards and the danger that arms and legs will be trapped by "ring-type guards").[7] J.A. 62-74.

Given these substantial safety concerns, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can * * * be counter-productive and can create new hazards of equal or greater consequence." J.A. 72.[8] In short, the Subcommittee determined that propeller guards could make boating *less safe*. Moreover, in light of the small number of propeller-strike incidents, requiring installation of a propeller guard on recreational boats would not make economic sense. *Id.* at 71. As a result, the Subcommittee recommended that there should be no propeller guard requirement and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at 73.

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* at 17-19 (Nov. 6-7, 1989) (J.A. 134-139). The 21 members of the Council, representing state governments, boat manufacturers, and the interested public, voted

[7] Most propeller guards increase significantly the "underwater profile" of a boat, "thereby increasing the chances of [underwater] contact." J.A. 67-69. Thus, although propellers alone "present the hazard of cutting wounds and penetration of the body," propeller guards "present the additional hazard of blunt trauma injuries, which are often more severe." *Ibid.* For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 66. The Subcommittee Report (*id.* at 69) also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or ring and held against the rotating propeller."

[8] "After considering the available data on propeller-strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

unanimously to adopt the Report and its conclusions and recommendations. *Id.* at 138; Pet. App. A8. The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. J.A. 47.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. J.A. 163-167; Pet. App. A9. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." J.A. 163 (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Ibid.*

In view of this extensive and uncontradicted record, the few courts that have considered claims such as petitioners' on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. Indeed, in each such case the court either granted summary judgment or directed a verdict for the manufacturer because of the failure of the plaintiff's proof. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the court concluded (*ibid.* (emphasis added)):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867 (8th Cir.), cert. denied, 510 U.S. 815 (1993) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might

engender"). State courts looking at the available data have reached the identical conclusion. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa. Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

E. The Present Case

In 1993 petitioners' daughter "fell or was thrown" from the boat in which she was riding as a passenger on Strom Thurmond Lake, which is on the Georgia-South Carolina border. Pet. App. A3; J.A. 32. She was allegedly struck by the propeller of the boat's outboard engine and died immediately. Pet. App. A3-A4; J.A. 32. The engine, which was designed and manufactured by respondent Brunswick Corporation, was equipped with a traditional open-screw propeller commonly found on recreational boats. *Ibid.*

Petitioners sued the operator of the boat and recovered a large settlement. They subsequently brought suit against Brunswick in Georgia state court, alleging that the boat's engine was defectively designed because it lacked a propeller guard and seeking compensatory and punitive damages. Pet. App. A4; J.A. 12-13. Brunswick removed the case to federal court. Pet App. A4. The district court granted Brunswick's motion for summary judgment on petitioners' state tort law claims, concluding that the claims were preempted by the Boat Safety Act. *Ibid.*

The court of appeals affirmed. Pet. App. A1-A25. The Eleventh Circuit held that petitioners' common law claims were not expressly preempted by Section 4306 because of the presence of the "Savings Provision" in Section 4311(g). "[T]he savings clause indicates that at least some common law claims survive express preemption." Pet. App. A14. As a result, the court resolved its doubts about whether petitioners' claims were expressly preempted "in favor of the narrower interpretation of the preemption clause and conclude[d] that the express preemption clause does not cover common law claims." *Ibid.*

The court of appeals nonetheless concluded that petitioners' common law claims were impliedly preempted. The Eleventh Circuit held that state law "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." Pet. App. A22. "Given that Congress intended for the [Act] to create a

uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements." *Id.* at A20.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Boat Safety Act of 1971 establishes a comprehensive federal boat safety program to be administered by the Coast Guard and implemented, in large measure, by the States. Over one aspect of boat safety, however, Congress reserved exclusive regulatory authority to the Coast Guard: "the establishment of national construction and performance standards for boats and associated equipment." Senate Report at 15. Congress sought to promote uniform national standards so that "interstate commerce" would not be "impeded" by equipment and design requirements that varied from State to State. *Id.* at 14.

Exercising its authority under this federal regulatory scheme, the Coast Guard conducted an 18-month, painstaking investigation, which culminated in a decision that propeller guards should not be required on recreational boats. The lengthy administrative proceedings revealed that propeller guards often make boats *less* safe and are not economically feasible.

Petitioners now seek to undermine the Coast Guard's deliberate decision, as well as the congressional goal of uniform national design standards and requirements, by bringing suit to enforce a requirement under Georgia common law that recreational boats be equipped with propeller guards. The Supremacy Clause of the Constitution does not permit that result.

First, 46 U.S.C. § 4306 expressly preempts petitioners' common law claims because they seek to establish state law equipment requirements that are "not identical" to a federal regulation issued by the Coast Guard. As the Solicitor General explains (U.S. Br. 15), the Coast Guard has long held "the view that the [Act] preempts state-promulgated rules and regulations regardless of whether a federal standard is in existence." Petitioners' efforts to limit the words "law,""standards," or "requirements" in Section 4306 to state statutes and regulations, and to exclude state common law, have been consistently rejected by this Court, including as recently as *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996). The Court has repeatedly held

that state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959).

By the same token, the Savings Provision in 46 U.S.C. § 4311(g) does not shield petitioners' common law claims from express preemption. Section 4311(g) has nothing to do with preemption; it states on its face only that, where suit may be brought under state law, Congress did not intend to provide an affirmative defense of compliance with federal standards. Indeed, because Section 4311(g) "saves" both "common law" *and* "State law," petitioners' argument would save *all* state law claims and would render the Act's express preemption provision a dead letter.

Second, regardless of the scope of Sections 4306 and 4311(g), petitioners' common law claims are impliedly preempted. It is undisputed that Congress gave the Coast Guard plenary authority over the issuance of uniform national boat construction standards and equipment requirements and that the Coast Guard, after a thorough investigation, determined that there should be no propeller guard requirement for recreational boats. It would frustrate the purpose of this comprehensive federal scheme for the States to second-guess the expert federal agency and impose just such a requirement.

Section 4311(g) does not dictate a contrary result. This Court has held for nearly a century that even broadly written savings provisions do not "save" state law claims that would conflict with or frustrate the purpose of a federal statute. Any other reading would cause the federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

At bottom, petitioners' arguments turn federal preemption law upside down. Petitioners assert that — despite the comprehensiveness of the federal boat safety program, the clarity of Congress' purpose in reserving to the Coast Guard the authority to issue uniform national equipment and design requirements, and the presence of a broadly worded preemption provision covering this "field" — Congress meant to allow each State, through its common law, to impose standards and requirements different from the federal standards (and different from those of other States as well). Rather than a scheme of uniform national standards, the outcome under petitioners' regime would be chaos, with boating design and equipment requirements varying from

State to State — and even within a single State based on the case-by-case assessments of lay juries. In light of the language, structure, and purposes of the Act, Congress could not conceivably have intended that result.

ARGUMENT

The Supremacy Clause of the Constitution resolves any conflict between federal law and state law in favor of federal law. U.S. Const. art. VI, cl. 2; *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 362 (1986); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Federal "preemption" occurs in three contexts. First, Congress may expressly declare that state law is preempted. See *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286-287 (1995); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Second, Congress may implicitly override state law where the breadth of a federal statute indicates an intent to occupy the field. See *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Third, state law may conflict with federal law either by making it impossible "to comply with both state and federal requirements," *id.* at 79, or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Under each of these formulations, the preemption question turns on the intent of Congress, to be resolved through the usual tools of statutory construction. See *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983).

Application of these familiar principles shows that petitioners' state law claims are preempted by the Boat Safety Act. Congress delegated to the Coast Guard plenary authority to establish requirements for equipment on recreational boats; after an extensive public investigation, the Coast Guard expressly determined that propeller guards should *not* be required on such boats. Yet petitioners seek to second-guess that federal determination and impose state law liability on respondent for not including a propeller guard on the boat that struck their daughter. Their proposed state law rule, however, is expressly preempted by the Boat Safety Act because it is not "identical to a regulation" issued by the Coast Guard, as required by the plain terms of 46 U.S.C. § 4306. Moreover, even in the absence of the express preemption provision, petitioners' proposed state law rule is impliedly preempted because it frustrates the purposes of the

federal boat safety scheme established by Congress, as well as the Coast Guard's studied determination that manufacturers should not be required to install propeller guards because they are ineffective and create safety hazards.

I. PETITIONERS' COMMON LAW CLAIMS ARE EXPRESSLY PREEMPTED BY THE BOAT SAFETY ACT

A. The Boat Safety Act's Preemption Provision Bars State Laws That Are "Not Identical" to a Coast Guard Regulation

The preemption analysis of petitioners' state law claims must begin with the text of the preemption provision of the Boat Safety Act. See *Medtronic*, 116 S. Ct. at 2251. Section 4306 states plainly and forcefully that (emphases added):

> *a State may not establish, continue in effect, or enforce a law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * *that is not identical to a regulation prescribed under section 4302 of this title.*

As a threshold matter, in interpreting this provision, the traditional presumption against express preemption of state regulation of health and safety matters, see *Medtronic*, 116 S. Ct. at 2250, is inapplicable (or, at the very least, greatly diminished) in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.[9]

---

[9] State law occasionally has been incorporated into admiralty law, but only to the extent that it is "consistent" with overriding "federal maritime principles and policies." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 116 S. Ct. 619, 628 n.13 (1996). "The federal cast of admiralty law * * * means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system * * *.'" *Id.* at 626 n.8 (quoting *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959)).

Consistent with this history, the text of the preemption provision is sweeping: no State may establish or enforce a law requiring an item of boat equipment that is "not identical" to a Coast Guard requirement on the subject. And, as the Solicitor General has acknowledged and the record clearly reflects, the Coast Guard has construed the text according to its plain meaning: "The Coast Guard has long interpreted [Section 4306] to preempt state positive laws and regulations, even when there is no counterpart federal regulation in effect under the Act." U.S. Br. 14. That is why the Coast Guard, the day after the Act was passed and before there were any federal regulations, temporarily exempted all existing state laws from preemption in order to avoid a regulatory vacuum. See 36 Fed. Reg. 15,764 (1971); see also, *e.g.*, J.A. 44-45 (although no federal regulation exists on liquified petroleum gas, Coast Guard opines that the Boat Safety Act's preemption provision "prohibits the states from establishing any requirement for associated equipment" concerning this matter).

It follows from the plain language of Section 4306 that petitioners' state law claims are expressly preempted by the Boat Safety Act. It is undisputed that they seek to "establish, continue in effect, or enforce" a rule of state law requiring propeller guards (which constitute "associated equipment") on a "recreational vessel" and that this state law rule is "not identical to" a Coast Guard regulation. To the contrary, the Coast Guard made a conscious decision *not* to issue a regulation requiring that boats be equipped with propeller guards.[10]

Petitioners' principal contrary argument (Pet. Br. 16-24) is based on a blatant misreading of the statute. They assert that, "[i]n order to fall under the domain expressly preempted, * * * Petitioner's claim must be a law, regulation, or requirement which *conflicts with* 'a regulation prescribed under section 4302' of the Act." *Id.* at 17 (emphasis added). See also Pet. Br. 3, 12. The words "conflicts with," however, appear nowhere in the statute. The Act on its face

[10] The alleged procedural deficiencies in the Coast Guard's decision not to impose a propeller guard requirement (see Pet. Br. 20-21 (*e.g.*, failure to comply with Administrative Procedure Act)) are irrelevant to the express preemption analysis. The only relevant inquiry is whether there is a federal regulation in place and whether the state law at issue is identical to that regulation.

preempts state laws that are "not identical to" a Coast Guard regulation. Indeed, petitioners' reading of Section 4302 would render the express preemption provision largely superfluous, because a state law claim that *conflicts with* a federal regulation would be *impliedly* preempted by operation of the Supremacy Clause. Congress clearly had something more in mind in *expressly* preempting state law equipment requirements.[11]

With no support in the statutory text, petitioners resort to misdirection. They cite this Court's decision in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), and argue (Pet. Br. 18-21) that the Court's holding in that case — that the absence of a federal regulation meant there was no express preemption under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* — governs this case as well. "The Court [in *Freightliner*] held that * * * '[i]n the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all.' * * * This is strikingly similar to the situation at bar, since there is no promulgated safety standard which addresses propeller guards." Pet. Br. 19.

The fundamental flaw in petitioners' argument is that the preemption provision at issue in *Freightliner* is markedly different from that in the Boat Safety Act. As the Court noted, the Motor Vehicle Safety Act's "pre-emption clause applies only '[w]henever a Federal motor vehicle safety standard . . . is in effect.'" 514 U.S. at 286. But Congress chose a quite different formulation in Section 4306, which preempts any state laws that are not "identical" to a

[11] Petitioners' discussion (Br. 22, 35) of the regulatory treatment of "personal watercraft" is misleading. First, the Coast Guard has *never* taken the position that it must "promulgate actual regulations if it wished to create a potentially preemptive regulation" (*id.* at 22). Second, the quotation in petitioners' brief is from the report of the NBSAC advisory subcommittee, not the Coast Guard. Finally, the Coast Guard has the authority under Section 4305 to "exempt" personal watercraft from federal regulation and thereby leave such regulation to "State and Local jurisdictions." J.A. 130. If the Coast Guard does not grant an exemption from federal regulation, however, state and local authorities are precluded by Section 4306 from adopting any law or regulation that is "not identical" to a Coast Guard regulation.

federal regulation. The Solicitor General has explained the inapplicability of *Freightliner* to this case (U.S. Br. 16 n.8):

> The Court based its decision in *Freightliner* on the introductory clause of the preemption provision, which required, as a prerequisite for preemption, that a federal regulation be "in effect" for the same aspect of performance. * * * The [Boat Safety Act]'s introductory clause is not written in a comparably limiting manner.

Petitioners ultimately retreat to the "legislative history" of the Boat Safety Act in an effort to overcome the plain language of the preemption provision. They refer to the Senate Report, which states (at 19) that anyone "adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." Petitioners argue (Pet. Br. 22) that because "Congress did not provide for any such relief in the absence of a promulgated standard," Congress could not have intended, as the text of the Act indicates, to preempt state law that is "not identical to" a Coast Guard regulation.[12]

Even if legislative history were relevant to "the interpretation of an unambiguous statute" (*Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 808 n.3 (1989)), the snippet cited by petitioners hardly suggests that Congress did not mean what it said in Section 4306. The Senate Report merely observed that certain procedural protections would be available before anyone is subjected to a federal requirement under the Act. Comparable protections are not necessary when the Coast Guard determines that a certain item of equipment should not be required or that an area should not be regulated. Persons who seek to have the federal government impose a boating standard do not lack a remedy: they may petition the Coast Guard to adopt a regulation (or

[12] Petitioners' invocation of the "presumption against pre-emption" (Pet. Br. 23) is, as discussed above (at page 17, *supra*), inapplicable here in light of the long history of exclusive federal control in the area of maritime safety. Moreover, petitioners' terse dismissal (Br. 23) of the notion that Congress would preempt the "field" of construction standards and equipment requirements ignores the explicit statement in the House Report (at 11) that "[t]he bill preempts the field on boating standards or regulations."

may persuade a State or local government to petition the Coast Guard to grant an exemption) under Sections 4305 and 4306. And the Coast Guard's final action may well be subject to judicial review under the Administrative Procedure Act. See 5 U.S.C. § 551(13); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-416 (1971). But none of this has anything to do with the scope of the express preemption provision.

In any event, the legislative history emphatically reinforces the plain language of Section 4306. Congress gave the Coast Guard plenary authority over construction and performance standards and equipment requirements in the first instance (§ 4306), but allowed the agency to exempt state laws (§ 4305) on a case-by-case basis as it deemed appropriate (see pages 5-7, *supra*). The House Report (at 11) described this statutory scheme as "preempt[ing] the field on boating standards or regulations."[13] And, as the Solicitor General acknowledges, witness after witness testifying in support of the Act "emphasized the need for uniform federal construction and equipment standards." U.S. Br. 4 n.2. The language Congress chose achieved that result.

Finally, whatever the scope of Section 4306 in the situation where the Coast Guard has never addressed a specific equipment requirement, where (as here) the Coast Guard actually *considers* a requirement and *rejects* it, the States are barred by the express preemption provision from adopting that requirement. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.* 454 Mich. 20, 557 N.W.2d 541 (1997). A common law claim "requiring manufacturers to install propeller guards" is expressly preempted by Section 4306, because it is "not identical to the Coast Guard's regulatory position." *Carstensen*, 49 F.3d at 431; see *Medtronic*, 116 S. Ct. at 2260

[13] The Solicitor General obliquely suggests in a footnote (U.S. Br. 14 n.6) that the absence of a "savings provision" in the original House version of the Act undermines the broad statement on federal preemption in the House Report. As we discuss below (at pages 29-33, *infra*), however, the "Savings Provision" was perceived as a minor "technical" amendment that had no application to federal preemption.

(Breyer, J., concurring) (agencies have discretion in how to communicate their "particularized pre-emptive intentions").

In deciding that propeller guards should not be required, the Coast Guard complied fully with the substantive standards and procedures set forth in Section 4302. Although petitioners assert (Pet. Br. 33) that the decision was not the product of a "formal" rulemaking, the Coast Guard took pains to insure that the public was given notice and an opportunity to participate in the proceedings and was notified of the result. Thus, the agency provided notice of public meetings in the Federal Register, see 54 Fed. Reg. 42138 (1989); *id.* at 15068; 53 Fed. Reg. 43070 (1988); *id.* at 33210, and issued a written ruling explaining its final decision. J.A. 163-167. Petitioners apparently fault the Coast Guard for not having taken the senseless step of issuing a formal regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act nor by preemption law generally.

In sum, the Coast Guard considered carefully whether there should be a propeller guard regulation and, on the basis of a voluminous record justifying its decision, declared that propeller guards should not be required. Congress in Section 4306 has given preemptive effect to that express regulatory determination.

B. The Preemption Provision of the Boat Safety Act Includes Within Its Scope State Common Law Claims

Based on the foregoing discussion, there can be no doubt that a Georgia *statute* or *regulation* requiring that recreational boats be equipped with propeller guards would be preempted by the Boat Safety Act. Petitioners and their *amici* nonetheless seek to distinguish an identical state *common law* requirement by arguing that "the preemption clause does not provide that 'common law' actions are preempted." Pet. Br. 24; see also U.S. Br. 17-19. Their position is ultimately premised on the notion that Congress intended the States to supplement the Coast Guard's regulatory scheme not through their legislatures or expert administrative agencies, but rather through lay juries acting on a case-by-case basis. This Court has repeatedly rejected that assertion in other comparable contexts, and there is no basis for a different conclusion here.

1. Section 4306 preempts a "State or political subdivision of a State" from adopting or enforcing a "*law* or *regulation* establishing a recreational vessel or associated equipment performance or other *safety standard* or imposing a *requirement* for associated equipment * * * that is not identical to a [Coast Guard] regulation" (emphases added). There is no basis for reading the broad phrases "state law or regulation," "safety standard," and "requirement" to exclude mandatory duties or requirements imposed by state common law. Indeed, in *Freightliner*, the Solicitor General agreed that the "sweeping term 'requirement'" subsumed common law liability. See No. 94-286, U.S. Br. 14.

Petitioners' contrary argument was explicitly rejected by the decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" 505 U.S. at 519-524 (plurality opinion) (citation omitted); *id.* at 548-549 (Scalia, J., concurring). The Court stated that it made no difference that the preemption clause "fail[ed] to include a specific" reference to common-law claims (*id.* at 521):

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules.

See *id.* at 548-549 ("'requirement[s] or prohibition[s]'" and "'State law' * * * embrace[] state common law") (Scalia, J., concurring).

The Court applied the same analysis in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), to the express preemption clause in the Federal Railroad Safety Act, under which "applicable federal regulations may preempt any state 'law, rule, regulation, order, or standard relating to railroad safety.'" Relying on *Cipollone*, the Court held that "[l]egal duties imposed * * * by the common law fall within the scope of these broad phrases." *Ibid.* This holding was entirely consistent with the Court's prior interpretation and usage of these same "broad phrases" in other contexts. See, *e.g.*, *Norfolk & W.R. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (preemption of "'all other law, including State and municipal law' is clear, broad and unqualified. It does not admit of the

distinction * * * between positive enactments and common law rules of liability"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) (giving the word "laws," as used in 28 U.S.C. § 1331, its "natural meaning" to include common law claims).[14]

The holdings in *Cipollone* and *Easterwood* were recently reaffirmed in *Medtronic*, where a majority of the Court endorsed the proposition that the word "requirement" encompasses state law tort claims for purposes of federal preemption. 116 S. Ct. at 2259-2260 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2262-2264 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part). As Justice O'Connor observed, "[w]hether relating to the labeling of cigarettes [*Cipollone*] or the manufacture of medical devices [*Medtronic*], state common-law damages actions operate to require manufacturers to comply with common law duties," and are therefore expressly preempted by a federal statute that bars state "requirements." *Id.* at 2262-2263; see *id.* at 2259 ("One can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law") (Breyer, J.).

The Court's approach in *Cipollone*, *Easterwood*, and *Medtronic* is ultimately premised on its longstanding recognition that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "'a form of regulation'"). Where, as here, Congress has expressed a strong interest in creating uniform national standards and in preempting inconsistent state duties, it would be irrational to read broad and generic phrases such as "law," "regulation," "standard," or "requirement" in a grudging and artificial way so as to exclude requirements imposed by a State's common law. See *Chicago*

---

[14] See also *Atherton* v. *Federal Deposit Ins. Corp.*, 117 S. Ct. 666, 675 (1997) (deciding whether "federal common law standards" created "a general standard of care"); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common-law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

& N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"); see also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 498-499 n.19 (1987) (rejecting the contention that "compensatory damages only require the [defendant] to pay * * * and thus do not 'regulate'").[15]

Indeed, as Justice Breyer noted in *Medtronic*, "a contrary holding would have anomalous consequences." 116 S. Ct. at 2259. If Congress were intent on creating uniform national standards and requirements, why would it preempt a state administrative regulation concerning a piece of equipment, such as a ventilation system, but not a common law rule on the same subject? "The effects of the state agency regulation and the state tort suit are identical," and it makes no sense "[t]o distinguish between them for pre-emption purposes." *Ibid.* To do so would be to "grant greater power * * * to a single jury than to state officials acting through state administrative or legislative lawmaking processes." *Ibid.* Because "the language of the statute and its legislative history provide little support for the[ir] proffered, counterintuitive reading," petitioners' arguments must be rejected. *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).[16]

---

[15] Petitioners and their *amici* contend (Pet. Br. 24-28; U.S. Br. 23-24) that tort claims do not establish state-wide standards or requirements, but merely represent a jury's single judgment about "the design of [a] particular boat[]," *id.* at 24. This argument overlooks not only the regulatory impact of compensatory damages awards, but also the purpose and effect of punitive damages — which petitioners seek in this case. Because punitive damages are designed to punish and deter a defendant's conduct (see *BMW of North Am., Inc.* v. *Gore*, 116 S. Ct. 1589 (1996)), they have a broad regulatory effect.

[16] Petitioners contend (Br. 25-27) that the language of Section 4306, and in particular the reference to a "State or political subdivision of a State," indicates that Congress did not mean to preempt common law duties. See also U.S. Br. 18 & n.9, 19. But these same supposed "anomalies" were present in the many other cases in which this Court has found common law claims to be within the ambit of an express preemption provision. For example, the express preemption clause in *Medtronic* (21

(continued...)

2. Unable to distinguish the controlling precedents of this Court, petitioners assert (Br. 27) that, despite the plain language of the Boat Safety Act, Congress was willing to tolerate a conflict between state common law duties and federal law. In making this argument, petitioners rely on the decisions in *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), and *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).[17] The Solicitor General also quotes from the same cases (U.S. Br. 22-23) in arguing that Congress intended to exclude common law claims

---

[16] (...continued)
U.S.C. § 360k(a)) precluded any "State or political subdivision of a State" from establishing or continuing in effect any "requirement" different from or in addition to a federal "requirement." See 116 S. Ct. 2248. The statute also allowed "a State or a political subdivision thereof" to apply for an exemption from the preemption provision (21 U.S.C. § 360k(b)). Nonetheless, the Court held that the preemption provision included common law claims. By contrast, petitioners' position fails to confront the anomaly that would arise from a distinction between "common law" claims and identical suits seeking damages based on state positive law. See, *e.g.*, Products Liability Act, N.J. Stat. Ann. §§ 2A:58C-1-58C-7 (codifying state common law on products liability); Ohio Products Liability Act, Ohio Rev. Code Ann. §§ 2307.71-2307.80 (same).

[17] Petitioners also rely (Br. 27) on *Yamaha Motor Corp.* v. *Calhoun*, 116 S. Ct. 619 (1996), but in that case the Court reaffirmed its longstanding view that "uniformity concerns" — particularly in the context of a "comprehensive" congressional scheme within the traditional federal maritime jurisdiction — compel "vindication of maritime policies demand[ing] uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." *Id.* at 626. For example, in applying the Death on the High Seas Act in *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986), the Court rejected as "incongruous" the "idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas." So too, here, it is equally incongruous to conclude that a Congress deeply concerned about creating uniformity in "*national* construction and performance standards for boats and associated equipment," Senate Report at 15 (emphasis added), would allow States to impose widely divergent standards through their common law.

from the scope of the express preemption provision because "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions."

None of these cases, however, involved a statutory and regulatory scheme that was even remotely similar to the Boat Safety Act, and none presented a question of express preemption. In *Goodyear Atomic*, for example, the Court interpreted a statute waiving the federal government's immunity from state regulation of federal enclaves. In discussing the limits of that waiver, and whether state workers' compensation awards would interfere with a federal program, the Court distinguished between a State's "incidental" and "direct" regulation of federal activities. The Court ultimately concluded that there was "clear congressional authorization" for the state action (486 U.S. at 182) and that the "incidental regulatory pressure" of occasional workers' compensation awards was fully consistent with the federal scheme. *Id.* at 186. In particular, there was no claim in *Goodyear Atomic* that state law would frustrate any federal regulation or policy.

The decisions in *English* and *Silkwood* are equally beside the point. Both cases involved preemption under the Atomic Energy Act, which contains no preemption provision (see *Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 461 U.S. 190, 205 (1983)) and, in fact, explicitly preserves significant authority for the States (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). In *Silkwood*, the Court found no preemption of the common law claim because the Price-Anderson Act — which established an indemnification scheme for nuclear plant operators held liable under state tort law — constituted affirmative evidence of Congress' acceptance of state tort actions (464 U.S. at 251-256).[18] As the Court explained in *English*, 496 U.S. at 86, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries."

---

[18] The sole question in *Silkwood* was whether federal law preempted state punitive damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for compensatory damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law.

These cases, which did not construe express preemption provisions, stand in marked contrast to the federal scheme under the Boat Safety Act. The regulatory effects of state compensatory and punitive damages awards are direct, not incidental. Moreover, the statute at issue here does not contain a "clear congressional authorization" for the States to play a role in setting boat design or equipment requirements and does not contain any indication that Congress was willing to tolerate tension between federal and state law. To the contrary, Congress expressly preempted *any* state law that is "not identical to" a regulation issued by the Coast Guard.

3. The Solicitor General also argues (U.S. Br. 20-21) that Section 4306 must be interpreted to exclude common law claims because tort law may "provide incentives for manufacturers to provide a higher standard of care than the 'minimum safety standards' mandated by the [Coast Guard] in federal regulations." To the extent that this argument is more than a policy disagreement with Congress, it turns on the phrase "*minimum* safety standards" — which, according to the Solicitor General, establishes a mere "floor with respect to safety measures" (*ibid.*).

The *uniform* national standards and requirements adopted under the Act cannot be dismissed so cavalierly. As the Senate Report explains (at 20 (emphasis added)), Congress carefully identified the single instance in which the States were authorized to "impose requirements * * * which *go beyond the federal requirements*" — *i.e.*, when necessary "to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. § 4306. And even in that one narrow area, Congress gave the Coast Guard the power to disapprove any additional state requirements, so as to preserve the goal of national "uniformity" in boat design standards based upon marine expertise. Thus, there is no basis in the statute or its legislative history to infer that the national standards and equipment requirements are a "floor" on which the States are free to build an edifice of supplementary (and conflicting) state law standards and requirements.

Moreover, this Court has already rejected the proposition that Congress' use of the phrase "minimum standards" in a federal statute authorizing the promulgation of national standards "requires recognition of state authority to impose higher standards than the Secretary [of Transportation] has prescribed." *Ray* v. *Atlantic Richfield Co.*, 435

U.S. 151, 168 n.19 (1978). The statutory goal of uniformity would be subverted by such an interpretation. Thus, where (as here) "it is sufficiently clear that Congress directed the promulgation of standards on the national level," "minimum safety standards" may not be supplemented by state law. *Ibid.* The federal standards are "minimum" only because *manufacturers* are free to add to them.

C. The "Savings Provision" of the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Preemption

Petitioners' final argument against express preemption of their state law claims (Pet. Br. 28-31) is based on the Boat Safety Act's "Savings Provision," 46 U.S.C. § 4311(g). They contend that this provision indicates that Congress "did not intend to include common law actions within the domain pre-empted by the Act." Pet. Br. 28; see also U.S. Br. 21 ("the savings clause * * * makes clear Congress's explicit intent to preserve tort liability").

Section 4311(g), however, cannot bear the weight of this construction. Both the text and the legislative history of the "Savings Provision" demonstrate that it was not intended to address federal preemption at all.

1. Section 4311(g) provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." Petitioners and their *amici* focus heavily on the reference in this provision to "common law" (see Pet. Br. 28-31; U.S. Br. 21-24) but completely ignore the inclusion of the phrase "State law." Congress' explicit reference to "State law," however, wholly undermines petitioners' reliance on this provision to limit federal preemption under the Act.

If, as petitioners argue, Section 4311(g) must be construed to limit the scope of preemption in Section 4306, then the Savings Provision would completely nullify the preemption provision. As noted above, petitioners insist that Section 4311(g) indicates that Congress "did not intend to include *common law* actions within the domain pre-empted by the Act" (Pet. Br. 28 (emphasis added)). But the text of Section 4311(g) draws no distinction between *state common law* claims and other *state law* claims. If "state law" is substituted for

"common law" in the preceding quote, express preemption under the Act disappears: Congress "did not intend to include *state law* actions within the domain pre-empted by the Act."

Petitioners elsewhere concede that state "law" includes "legislative or executive decision-making processes." Pet. Br. 25; see also U.S. Br. 18 n.9 (state "law" refers to "state positive law imposing prescriptive requirements"). Thus, under petitioners' reading of Section 4311(g), a manufacturer could be held liable under a "state law" — including a state statute or administrative regulation — that imposes boat design or equipment requirements that are not identical to (or even flatly inconsistent with) a federal regulation issued under the Act. That result is, of course, plainly contrary to the preemption provision in Section 4306 — indeed, it robs that carefully crafted section of the Act of any purpose — but it is compelled by petitioners' reading of the Savings Provision.[19]

2. Contrary to petitioners' arguments, the text, structure, and legislative history of Section 4311(g) demonstrate that the Savings Provision was not designed to limit the scope of federal preemption under Section 4306 at all. As demonstrated above (at pages 7-8, *supra*), the provision was added as a "technical" amendment to the end of the statute in a section wholly apart from — and without any reference in the legislative history to — the preemption provision. Moreover, the text of the Savings Provision does not refer to federal preemption or to the limits of federal supremacy.

Instead, Section 4311(g) merely clarifies that Congress, in enacting the Boat Safety Act, did not intend to provide an affirmative defense of compliance with government standards in areas where Section 4306 allows suit to be brought under state law. That is what the provision quite literally says: "Compliance with [a federal standard or regulation] does not relieve a person from liability at common law or under State law." And the explanation in the Senate

---

[19] The Solicitor General's reading of Section 4311(g) suffers from the same flaw. The Solicitor General asserts (U.S. Br. 21) that "the savings clause * * * makes clear Congress's explicit intent to preserve [common law] liability," but he makes no effort to explain how the Court could distinguish state common law claims from other state law claims without doing violence to the words of the statute.

Report (at 32 (emphasis added)) is fully in accord with this language: the "purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act will not be a *complete defense* to liability."

Consistent with this limited purpose, the Report goes on to state that "depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value." If, in fact, the Savings Provision were actually addressed to federal preemption, there would have been no reason for Congress to be concerned with state evidentiary rules or the admissibility of a manufacturer's compliance.[20]

Thus, rather than limiting federal preemption, the Savings Provision precludes manufacturers from relying on compliance with federal standards as a defense to state law liability in areas where state law still has a role to play, *e.g.*, in areas unrelated to design, construction, and performance standards or equipment requirements. For example, a manufacturer could not avoid liability for breach of warranty by relying on its compliance with Coast Guard standards. See Senate Hearing at 48 (statement of Admiral Bender). Similarly, where a State has supplemented a federal requirement because of "uniquely hazardous conditions or circumstances," or been granted an exemption under Section 4305, a manufacturer could not avoid liability under state law by claiming compliance with the federal standards.

Finally, as the Eleventh Circuit suggested (Pet. App. A22), a manufacturer might also be liable under state law for negligently manufacturing or installing a safety device that was required by a federal regulation. See also Senate Hearing at 48 (statement of Admiral Bender). For example, in *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988) (defective throttle), the

---

[20] Although petitioners and the Solicitor General rely on the testimony of the Executive Director of the Boat Owners Association of the United States, that testimony supports our position. See Pet. Br. 28; U.S. Br. 22 n.12. This witness asked that Congress add a "savings provision" — which he described as an amendment "technical in nature" — to "clarif[y] that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits." Senate Hearing at 88.

court held that state tort claims based on defectively manufactured or installed equipment were not preempted by the Act. As the Eighth Circuit observed in *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430, 432, cert. denied, 116 S. Ct. 182 (1995), "common law claims asserting liability for defectively designed products that are actually installed may not be preempted," even though their installation was required by federal standards. Many, if not most, tort claims involving boat equipment are likely to fall into these categories.

In sum, there are several important areas of state law liability that are saved by the Savings Provision — without interfering in any way with Congress' intent in Section 4306 to preempt the "field" of boat construction and performance standards and equipment requirements. This interpretation of Section 4311(g) is faithful to the statutory language and gives full effect to both the preemption and savings provisions. Petitioners' implausible and internally inconsistent reading, by comparison, cannot be reconciled with the wording, structure, or legislative history of the Act. The "short answer is that Congress did not write the statute that way." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989).[21]

---

[21] Petitioners complain (Br. 23, 38) that Congress could not have intended to remove their "tort remedies without comment." But Congress did comment expressly in Section 4306 and throughout the legislative history of the Act that state laws that are not identical to federal equipment requirements are preempted. Moreover, petitioners' assertion that they would be left uncompensated for "tortious behavior" assumes that the absence of a propeller guard was tortious, and thus is nothing more than a quarrel with the Coast Guard's determination that manufacturers should not be required to include such equipment. In any event, this Court often has found federal preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55 (1987); see, *e.g.*, *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 391 n.4 (1987) (rejecting notion that there is no federal preemption unless the federal scheme "provides the plaintiff with a remedy"); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981) ("finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed"); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-155 (1964) (Jones Act preempts state law even though plaintiff had no cause of action

(continued...)

Petitioners' common law claims seek damages for violation of a duty imposed by Georgia law that the boat built by Brunswick be equipped with a propeller guard. It is undisputed that this state law requirement is not identical to an equipment requirement imposed by federal law. It is, in fact, contrary to the Coast Guard's considered judgment in the matter. Thus, the state law claims are expressly preempted by Section 4306 and are not saved from preemption by Section 4311(g).

II. PETITIONERS' COMMON LAW CLAIMS ARE IMPLIEDLY PREEMPTED BY THE COAST GUARD'S DECISION THAT PROPELLER GUARDS SHOULD NOT BE REQUIRED

A. Petitioners' Attempt to Second-Guess the Coast Guard's Rejection of a Propeller Guard Requirement is Barred by the Supremacy Clause

After an 18-month investigation of propeller guards and propeller-strike incidents, which included nationwide public hearings, a review of voluminous documentary and video evidence, and several physical demonstrations (see pages 8-12, *supra*), an expert federal advisory committee produced a lengthy Report recommending that there should be "no regulatory action to require propeller guards." J.A. 73. The Coast Guard, after reviewing the Report and all of the underlying evidence, independently concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.* at 163.

---

[21] (...continued)
under the Act).

We note in addition that, in most cases involving a propeller-strike accident, the plaintiff has a cause of action against the boat operator, unrelated to the Coast Guard's standards. See J.A. 72-73 ("[o]perator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities"). Here, for example, petitioners brought suit against the operator of the boat, which they later settled. Thus, as a practical matter, plaintiffs do have a tort remedy for propeller-strike accidents that is not preempted by federal law.

In light of this compelling and uncontroverted record, petitioners' common law claims are impliedly preempted under the Boat Safety Act by operation of the Supremacy Clause. If allowed to proceed with their tort claims, petitioners propose to hold Brunswick liable for potentially massive compensatory and punitive damages (J.A. 12-13) for failing to do what the Coast Guard has decided Brunswick should not be required to do: install propeller guards on its boat engines. This state law requirement would conflict with and frustrate the purposes of the federal regulatory scheme — both by countermanding the Coast Guard's decision that there should not be a propeller guard requirement and by undermining the national uniformity of standards and equipment requirements mandated by Congress.

Consider the facts of this case. The boating accident at issue occurred on Strom Thurmond Lake, which forms part of the border between Georgia and South Carolina. Petitioners seek to enforce a duty, imposed by Georgia common law, that would require propeller guards on at least some recreational boats. Under petitioners' interpretation of the Act, however, South Carolina would be free to adopt the opposite common law rule: propeller guards may not be installed, because (as the courts that have addressed the issue have concluded (see pages 12-13, *supra*)), they could make boats more dangerous. In this situation, no recreational boat could operate on Strom Thurmond Lake without subjecting the manufacturer to the possibility of damages under conflicting state laws.

The Supremacy Clause will not permit that result. Congress and the Coast Guard have acted to eliminate any conflicting state laws by adopting "national construction and performance standards for boats and associated equipment." Senate Report at 15. Any state law that conflicts with or frustrates the purposes of this comprehensive federal program is preempted. See *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Freightliner*, 514 U.S. at 287. Particularly where, as here, the Coast Guard has focused on an item of equipment and decided that it should not be required, a State may not impose a contrary requirement on manufacturers. As the Eleventh Circuit concluded (Pet. App. A22), in joining every other court to consider the issue of

preemption,[22] state law cannot punish "the failure to install a product that the Coast Guard has decided should not be required."

Petitioners offer two responses. First, they assert (Br. 31-32) that Congress intended to bar any implied preemption analysis under the Boat Safety Act — in effect, that Congress was indifferent to whether state law frustrated the purposes of the federal statute. Second, they contend (Br. 33-38) that their common law claims would not frustrate the federal regulatory scheme — in effect, that the Coast Guard was indifferent to whether boats should be equipped with propeller guards. Petitioners offer no credible support for these remarkable assertions.

B. Implied Conflict Preemption is Fully Applicable Under the Boat Safety Act

Relying on this Court's preemption analysis in *Cipollone*, 505 U.S. at 517-518, petitioners initially contend that the text of the Boat Safety Act alone provides a "reliable indicium of Congressional intent" to preclude implied conflict preemption of all common law claims (Pet. Br. 32). Thus, petitioners assert (*ibid.*) that the absence of a reference to common law duties in Section 4306, and the language of the "Savings Provision" in Section 4311(g), combine to show a congressional intent not "to imply further pre-emption." Pet. Br. 32.

For the reasons discussed above (at pages 17-33, *supra*), petitioners are wrong in their assumption that Congress meant to exclude state common law duties from express preemption. But

---

[22] See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993); but cf. *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994) (failing to address implied preemption because of the presence of the express preemption clause — an analysis rejected by this Court in *Freightliner*).

regardless of the scope of Sections 4306 and 4311(g), petitioners have offered *no* evidence that Congress intended simply by enacting these provisions to cast aside the traditional restrictions on state authority "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984).

To the extent that petitioners argue that the mere presence of an express preemption clause in the Act precludes implied preemption (see Pet. Br. 32 ("this invitation for imprecise guesswork as to Congress' intent is exactly why implied pre-emption is eschewed in the face of an express preemption clause")), this Court has already disposed of that argument. In *Freightliner*, the Court emphatically rejected the proposition "that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute." 514 U.S. at 287. The Court dismissed this contention as premised on a plain misreading of a single sentence in *Cipollone*, in which the Court had observed that (505 U.S. at 517):

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone* v. *White Motor Corp.*, 435 U.S. at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

The *Freightliner* Court rejected as entirely "without merit" any interpretation of this sentence (such as that urged by petitioners) that would preclude an implied preemption inquiry in the face of an express preemption clause. 514 U.S. at 287. "The fact that an express definition of the pre-emptive reach of a statute 'implies' — *i.e.*, supports a reasonable inference — that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Id.* at 288. Indeed, the Court in *Freightliner* then proceeded to engage in a traditional implied preemption analysis of the common law claims at issue. *Id.* at 289-290.

The Court reaffirmed this view in *Medtronic*. There, the plurality opinion by Justice Stevens found that certain common law claims were not expressly preempted by the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act, but observed that such

claims might still be "pre-empted under conflict pre-emption analysis." 116 S. Ct. at 2259. And just last Term in *Boggs* v. *Boggs*, 117 S. Ct. 1754, 1762 (1997), the Court decided the case on the basis of implied conflict preemption under the Employee Retirement Income Security Act even though that statute has an express preemption clause. In fact, the Court has often considered (and accepted) implied preemption arguments in cases involving federal statutes with express preemption provisions.[23]

It is, in the final analysis, bizarre in the extreme to attribute to Congress an intent to permit state law to destroy a comprehensive federal safety program merely because it includes an express preemption provision in a federal statute. Why would Congress, by precluding one area of state action, want thereby implicitly to authorize other areas of state action that would make the federal scheme ineffective? If that were the law, "only the most sporting of Congresses will dare say anything about preemption." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in part) Petitioners do not, and cannot, offer a satisfactory explanation.

C. Petitioners' Common Law Claims Would Frustrate the Purpose of the Coast Guard's Decision On Propeller Guards and Would Undermine Congress' Goal of Creating Uniform National Standards and Requirements

Petitioners and their *amici* advance several arguments in an attempt to show that, even if an implied preemption analysis is permissible, their state law claims do not frustrate the purposes of the

---

[23] *See, e.g., Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purpose and objectives of Congress." *Id.* at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

Boat Safety Act. These arguments, however, all founder on the historical record, which shows unequivocally that the Coast Guard determined that propeller guards should not be required on recreational boats because of safety and economic considerations. Given this judgment by the expert federal agency, States may not impose an inconsistent requirement.[24]

1. The Solicitor General begins with the carefully guarded statement (U.S. Br. 25-26 n.17) that the Coast Guard did not "necessarily" adopt one of the rationales of the Propeller Guard Subcommittee and the NBSAC — *i.e.*, that propeller guards often make boats less safe (J.A. 66-74) — in endorsing their recommendation that propeller guards should not be required. But the Solicitor General does not and cannot dispute that the Coast Guard decided, after a thorough review of the available safety data, not to impose a propeller guard requirement. Moreover, the Solicitor General never affirmatively states that the Coast Guard believes that propeller guards are safe.

In fact, *post hoc* rationalizations of counsel aside, the extensive record on the issue of propeller guard safety at the time the Coast Guard issued its decision is so compelling (see pages 8-12, *supra*) that any reasonable person — and, in particular, any boat manufacturer — would necessarily have concluded that, in adopting the recommendation of the NBSAC, the Coast Guard shared its rationales. Those rationales were that propeller guards are ineffective and often unsafe, and that, even if propeller guards did not themselves create independent safety hazards, requiring such equipment — in light of the few propeller-strike incidents each year — would impose a "prohibitive cost" on manufacturers with "only a negligible impact on improving boat safety." J.A. 71-72.

The Solicitor General simply mischaracterizes the record by suggesting that the Propeller Guard Subcommittee did not study a "range" of different propeller guards and their efficacy on different

---

[24] Brunswick has never argued, and the Eleventh Circuit did not hold, that it would be impossible for it to comply with the Coast Guard's regulations and petitioners' common law standard. The argument in petitioners' brief on this issue (at 33-34; see also U.S. Br. 26) is simply a straw man.

types of boats and propulsion systems. U.S. Br. 23-24. The record shows that, at the direction of the Coast Guard (J.A. 76), the Subcommittee reviewed the "many variations" of propeller guards, and focused on the "three basic configurations" (*id.* at 60). Similarly, at the request of the Coast Guard (*id.* at 76), the Subcommittee reviewed different types of propulsion units and different boat and hull designs and the efficacy of propeller guards on each (*id.* at 58-60).

The Subcommittee's conclusions about propeller guard safety and cost effectiveness, and its resulting recommendation that the Coast Guard should reject a propeller guard requirement, were self-evidently based on this exhaustive investigation. The Subcommittee's conclusions included generalized safety concerns about all propeller guards, as well as specialized concerns about particular propeller guards or their use on certain types of boats or propulsion systems. For example, the Subcommittee concluded that "mask and ring-type guards" present significant risk of "blunt trauma injury * * * at speeds over 10 mph." J.A. 69. "Propellers encased in the Kort nozzle, or tunnel," on the other hand, "substitute impact for propeller cut hazard, have rapid loss of efficiency above 10 mph and are not operationally feasible at normal pleasure boat speeds." *Id.* at 70. And "[w]ater jet propulsion" causes a "loss in efficiency and results in newly created operational handling problems." *Ibid.*

Several of the Subcommittee's safety concerns, such as the adverse impact of propeller guards on "boat operation" and handling at normal boating speeds in excess of 10 miles per hour, applied to all types of propeller guards on all types of propulsion systems. J.A. 70. Other safety concerns were quite specific. Thus, the Subcommittee considered and rejected on safety grounds a proposal that propeller guards be included on "water ski boats" or on "boats equipped with swimming platforms and ladders." *Id.* at 71.

Based on its extensive analysis, the Subcommittee concluded that the use of propeller guards can "be counterproductive and can create new hazards of equal or greater consequence." J.A. 72. In addition, the Subcommittee found that because propellers cause injury "in only a minority of underwater impacts," and because the cost of "retrofit[ting] 10 to 15,000,000 existing boats" would be huge, a propeller guard requirement would not be "economically feasible." *Id.* at 71-

72. The Act specifically directs the Coast Guard and the NBSAC to make this kind of assessment. See 46 U.S.C. § 4302(c)(3).

Accordingly, contrary to the impression created in the Solicitor General's brief, the Subcommittee's conclusions applied to a wide variety of propeller guards, propulsion systems, and boats; it was not simply a determination that a "universal" safety guard was infeasible. And these broad conclusions, adopted unanimously by the NBSAC, supported the recommendation to the Coast Guard that there should not be a propeller guard requirement for recreational boats. In short, the Subcommittee's and the NBSAC's conclusions and recommendations were clearly based on overriding safety and economic concerns.

In light of this record, it is difficult to credit the Solicitor General's revisionist view, offered for the first time years after the fact, that the Coast Guard adopted the recommendations of the Subcommittee and the NBSAC on propeller guards but perhaps not their supporting safety rationale. In any event, whether the Coast Guard refused to adopt a propeller guard requirement for safety concerns, economic concerns, or both, its decision would be frustrated by a mandatory state law requirement that boats be equipped with propeller guards.

2. Petitioners and the Solicitor General also protest (Pet. Br. 34-36; U.S. Br. 26-28) that the Coast Guard's decision does not have preemptive effect because the Coast Guard never promulgated a "formal" regulation on propeller guards. This argument grossly understates and mischaracterizes the Coast Guard's involvement in the propeller guard controversy. The agency's decision not to require propeller guards reflected not agnosticism or indifference but a conscious weighing of the regulatory costs and benefits. This was precisely the kind of federal "inaction *joined with action*" that this Court held in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[25]

Here, the Coast Guard, acting pursuant to its plenary authority under the Boat Safety Act — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — expressly determined that propeller guards should not be required. In light of the voluminous record documenting the federal decision to reject a propeller guard requirement, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*

3. Petitioners respond (Br. 34-38) that this Court's ruling in *Freightliner* is indistinguishable from this case and compels the conclusion that the Coast Guard's decision to reject a propeller guard requirement is entitled to no preemptive effect. In fact, *Freightliner* strongly supports preemption here.

As discussed above (see pages 19-20, *supra*), *Freightliner* involved Federal Motor Vehicle Safety Standard 121, which "imposed stopping distances and vehicle stability requirements for trucks." 514 U.S. at 284. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Id.* at 285. On judicial review of Standard 121, the Ninth Circuit set aside the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 285 (quoting *Paccar, Inc.* v. *NHTSA*, 573

---

[25] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distance and lock-up requirements no longer applied to trucks and trailers." 514 U.S. at 285.[26]

The plaintiffs in *Freightliner* were involved in accidents with trucks manufactured by the defendants. They brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants contended that these tort claims were impliedly preempted because NHTSA intended to leave the issue of truck stopping distances unregulated. This Court rejected that argument because it found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes*.

Id. at 286 (emphasis added).

This case is markedly different from *Freightliner* in several critical respects. First, unlike in *Freightliner*, there *is* conclusive evidence here that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 514 U.S. at 286-287. The Coast Guard concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." J.A. 163. Second, in *Freightliner* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. Clearly, the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

---

[26] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 514 U.S. at 285 (citations omitted).

Equally unpersuasive is the Solicitor General's contention that the Boat Safety Act does not give the Coast Guard "primacy in a particular regulated field." U.S. Br. 27. The Act delegates to the Coast Guard exclusive authority to issue boat construction and performance standards and equipment requirements. Whatever role the States may play in this area is subject to the Coast Guard's express approval. 46 U.S.C. §§ 4305, 4306. The Coast Guard also is given supervisory authority over state law enforcement and education programs under the Act See pages 2-4, *supra*. This is precisely the kind of case where "Congress intended to centralize all authority over the regulated area in one decisionmaker." *Freightliner*, 514 U.S. at 286.

Congress' stated goal in creating this comprehensive scheme was the adoption of *uniform national* construction and performance standards and equipment requirements. Senate Report at 20. As the Vice President of the National Association of State Boating Law Administrators testified, the Act provides (Senate Hearing at 98 (emphasis added))

> for Federal regulation of body design and detached equipment performance or safety standards, and *no State, without the consent of the [Coast Guard], may be more restrictive in equipment requirements, thereby assuring uniformity among the several Government jurisdictions*.

Thus, although the Solicitor General may be correct that Congress did not mean to "occupy the complete field of motorboat safety" (U.S. Br. 28), the Act quite plainly intended the federal government to occupy the "field" of boat design and equipment requirements.

Finally, the Solicitor General argues (U.S. Br. 26-27) that petitioners' claims are not impliedly preempted because they "do not hinder in any way the ability of the Coast Guard to promulgate federal regulations regarding propeller guards." But no state law claim would be impliedly preempted if *that* were the governing standard, no matter how destructive of the federal program. The question is not whether state law prevents what the Coast Guard might choose to do in the future; it is whether state law would frustrate the federal regulatory scheme as it *now* exists. And as the Solicitor General notes (U.S. Br. 7-8), the Coast Guard has continued to gather evidence and to seek

comments on effective devices to prevent propeller-strike accidents, but "has not yet issued any regulations to require" propeller guards.

D. The Savings Provision in the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Implied Preemption

Although petitioners' common law claims conflict directly and substantially with the Coast Guard's decision not to mandate propeller guards as an item of equipment on recreational boats, petitioners nonetheless contend (Br. 37-38) that the Act's Savings Provision saves these claims from implied preemption. Even if Section 4311(g) were viewed as a limitation on preemption (but see pages 29-33, *supra*), it indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that state law claims could proceed in areas unrelated to "construction and performance standards for boats and associated equipment." Senate Report at 15. In the absence of the Savings Provision, defendants in such suits might have argued that the comprehensiveness of the federal scheme ousted the States from the field of boat safety entirely.

Faced with "savings clauses" in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with or frustrate federal law. *Id.* at 328. Rather, such provisions are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute, not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections, but to

preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these views in interpreting similar savings clauses. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-391 (1992) (Congress did not intend to "'undermine this carefully drawn statute through a general saving clause'") (quoting *International Paper Co.* v. *Ouellette*, 479 U.S. 494 (1987)); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

As these precedents indicate, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating uniform national boat construction and performance standards and equipment requirements, but rather to evidence Congress' intent not to preempt the remainder of the field of boat safety. The Savings Provision does not, however, save petitioners' common law claims from implied preemption, because they would frustrate the Coast Guard's clear determination that propeller guards should not be required on recreational boats.

* * * * *

At the end of the day, petitioners fail to provide any answer to the dispositive question of congressional intent: Why would Congress have given the Coast Guard plenary authority to craft a program of uniform national boat construction standards and equipment requirements, and have expressly precluded the Georgia legislature and administrative agencies from playing any role in that process, yet at the same time allowed Georgia courts and lay juries to reject the federal standards and to create a regime of disuniform state law equipment requirements? The incoherence of such a scheme is a convincing rebuttal to petitioners' arguments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DANIEL J. CONNOLLY
Faegre & Benson
90 South Seventh Street
2200 Norwest Center
Minneapolis, MN 55402
(612) 336-3000

KENNETH S. GELLER*
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

JAMES W. HAGAN
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

**Counsel of Record*

JANUARY 1998

Supreme Court, U.S.
FILED
FEB 18 1998
CLERK

No. 97-288

In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

DAVID E. HUDSON*
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
Suite 700 – SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481

R. BEN HOGAN, III
HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203
(205) 324-5635

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-7831

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. PETITIONERS' COMMON LAW CLAIMS ARE NOT EXPRESSLY PRE-EMPTED 1

A. Section 4306 Does Not Pre-empt the Claims Asserted By the Lewis Family 1

1. Section 4306 only pre-empts positive law ... 1

2. Section 4306 does not pre-empt the actions of a judge or jury 4

3. Section 4306 only pre-empts a law or regulation which conflicts with "a regulation prescribed under section 4302" 5

B. The Savings Clause of the Act Confirms that the Lewis' Claims Are Not Expressly Pre-empted 6

1. Section 4311(g) is a savings provision which limits the pre-emptive scope of this Act 6

2. Section 4311(g) preserves Petitioners' claims 8

3. The effects of "common law" and "a law or regulation" are not identical 11

II. PETITIONERS' CLAIMS ARE NOT IMPLIEDLY PRE-EMPTED 12

A. Petitioners' Claims Promote the Ultimate Purpose of the Boat Safety Act: "Safety" 12

TABLE OF CONTENTS – Continued

Page

B. Congress Intended Only to "Encourage" the Goal of Uniformity, and Provided That It Be Encouraged Through the Actual "Establishment" of Standards 14

C. In the Absence of the "Establishment" of Federal Standards, Congress Intended Common Law Actions to Remain Viable 16

D. The Coast Guard Did Not Find that Propeller Guards Are Inherently Unsafe or Should Be Banned 18

III. CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

American Airlines v. Wolens, 115 S. Ct. 817 (1995) 9

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 2

Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E. 2d 671 (Ga. 1994) 7

Brown v. Gardner, 115 S. Ct. 552 (1994) 2, 3

Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) 2

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ...*passim*

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) 1

Duncan v. Louisiana, 391 U.S. 145 (1968) 4

English v. General Electric Co., 496 U.S. 72 (1990) 12

Fitzpatrick v. OMC, No. 82-9635 (Pa. Ct. Of Common Pleas, Jan. 28, 1985) 20

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) ...*passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 8, 11, 12

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4, 5

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 2

Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996) 3, 8, 15

Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985) 4

TABLE OF AUTHORITIES – Continued

Page

Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs, 461 U.S. 624 (1983) 3

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 9

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 10

Richards v. United States, 369 U.S. 1 (1962) 2

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 13

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984) 11, 12

Smith v. United States, 113 S. Ct. 2050 (1993) 2

South Dakota v. Yankton Sioux Tribe, No. 96-1581 (U.S. Jan. 26, 1998) 9

The T.J. Hooper, 60 F.2d 737 (2nd Cir.), *cert. den'd*, 287 U.S. 662 (1932) 17

United States v. Burke, 504 U.S. 229 (1992) 3

United States v. Menasche, 348 U.S. 528 (1955) 6

Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619 (1996) 12, 13

STATUTES

5 U.S.C. § 553 ("Administrative Procedure Act") 14, 15

15 U.S.C. § 4406 ("Comprehensive Smokeless Tobacco Health Education Act") 7

15 U.S.C. §§ 1381 *et seq.* ("National Traffic and Motor Vehicle Safety Act of 1966") 13

29 U.S.C. § 630(f) ("Age Discrimination in Employment Act") 4

46 U.S.C. §§ 4301-4311 ("Boat Safety Act of 1971") ...*passim*

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

117 Cong. Rec. 23,958 (July 8, 1971) 13

OTHER MATERIALS

Morris on Torts (2d ed. 1980) 12

Prosser & Keeton on Torts (4th ed. 1984) 12

RESTATEMENT (SECOND) OF TORTS § 288(C) (1965) 7

I. PETITIONERS' COMMON LAW CLAIMS ARE NOT EXPRESSLY PRE-EMPTED

"[I]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the *plain wording* of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added). Respondent argues at length (Br. Resp. 14-33) that the Boat Safety Act *expressly* pre-empts the common law claims brought by Petitioners. The "plain wording" of the Boat Safety Act does not support this assertion; it only expressly pre-empts "a law or regulation" promulgated by a state in certain situations, while also providing that "compliance with [the Act or its regulations] does not relieve a person from liability at common law or under State law." 46 U.S.C. §§ 4306, 4311(g).

What Respondent really asks this Court to do is *imply* that "common law" was intended to be subsumed into the terms expressly chosen by Congress to convey its pre-emptive intent ("a law or regulation" in section 4306), and then to simultaneously *imply* that Congress intended an unstated limitation when it expressly saved "liability at common law" in section 4311(g). To accomplish this, Respondent relies on cases interpreting statutes with substantially different pre-emption provisions (Br. Resp. 22-25) to first urge that "common law" is always equivalent to "a law or regulation," and then assert that the savings clause "has nothing to do with preemption." Br. Resp. 15. As shown below, the linguistic implications urged by Respondent are inconsistent with the text, purpose, and history of the Boat Safety Act.

A. Section 4306 Does Not Pre-empt the Claims Asserted By the Lewis Family.

1. Section 4306 only pre-empts positive law.

1. Under section 4306, the only type of state action subject to pre-emption is "a law or regulation" which is established, continued, or enforced by a State or political subdivision of a State. The term "a law" – expressed by

Congress in the singular – is plainly a reference to statutory enactments of legislative bodies; "a law" is not the way anyone would refer to general duties that give rise to damages liability. Importantly, Congress has repeatedly demonstrated its ability to expressly refer to "common law" when it intends to pre-empt it. *Compare* statutes referenced at Br. Pet. 25. Indeed, the express reference to "common law" in the Act's savings clause (section 4311[g]) shows that Congress was cognizant of common law *in this very piece of legislation* yet did not include it in section 4306. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *See, e.g., Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) (internal quotation marks omitted).

Moreover, "[l]anguage . . . cannot be interpreted apart from context." *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993). Here the term "a law" in section 4306 does not stand in isolation, but rather as a counterpart to the word "regulation," which is a prescriptive requirement promulgated by an administrative rather than legislative body. Indeed this Court in *Cipollone* repeatedly noted that the word "regulation" is a reference only to positive law and **not** to common-law duties or damages liability. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519, 523 (1992).

Thus if "a word is known by the company it keeps," *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) (*citing Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 [1961]), and if we are to adhere to this Court's oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used,' " *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richards v. United States*, 369 U.S. 1, 9 [1962]), the phrase "a law or regulation" as used in this Act cannot plausibly be read to encompass the damage claims in Petitioners' suit.

2. The terms "a law" and "a . . . regulation" are then further *narrowed* by section 4306's description of the *specific kinds* of "law[s] or regulation[s]" that may not be "establish[ed]" (namely, certain safety standards or equipment

requirements). Section 4306 is thus entirely different from the pre-emption provision of the 1969 act at issue in *Cipollone*, relied upon by Respondent, which broadly pre-empted any "requirement or prohibition" under "state law." 505 U.S. at 515. Section 4306, by contrast, contains no broad reference to pre-empting the whole body of "state law" which can be construed to cover the common law. Rather, it narrowly refers only to "a law or regulation" which "establish[es] a recreational vessel or associated equipment performance or other safety standard or impos[es] a requirement for associated equipment. . . . " 46 U.S.C. § 4306.

3. Congress consistently uses the term "standard" in this Act to refer to enacted regulations. *See* 46 U.S.C. §§ 4302(a)(1), (a)(2); 4304; 4311(f)(1), (f)(2). Since "a word is presumed to have the same meaning in all subsections of the same statute," *Morrison-Knudsen Constr. Co. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983), "standards" in section 4306 must refer to state positive law.

The use of the phrase "or requirement for associated equipment" does not reach damages liability either. Absent any contrary intent on the face of the statute, because the word "requirement" is simply a type of "a law or regulation" contained in a series of items that manifestly do **not** include damages liability, there is no reason to believe Congress intended it to cover tort liability in such an offhand way. Thus, the pre-emption provision here uses "requirement" in a very different context from those acts relied upon by Respondent. *See Cipollone*, 505 U.S. at 515 (pre-empting a "requirement or prohibition"); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2248-2249 (1996) (only pre-empting "requirement[s]"). Since a word is known by the company it keeps, "requirement" should not be given a meaning drastically at odds with the other words in the series. *Brown*, 115 S. Ct. at 555; *see United States v. Burke*, 504 U.S. 229, 243-244 (1992) (separate opinion of Scalia, J.).

4. Section 4306 also provides that a State or political subdivision of a State "may not establish, continue in effect, or enforce" certain state boat safety standards or equipment requirements. These terms again refer to positive law and not

damages actions in their common parlance. In interpreting these phrases, a "court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

2. Section 4306 does not pre-empt the actions of a judge or jury.

1. Section 4306 *only* forbids "a State or political subdivision of a State" from undertaking certain activities. Thus, to prevail, Respondent must also show that a jury award is issued by a "State or political subdivision of a State" within the meaning of section 4306. In common parlance, one would not describe a civil jury – whose principal functions are to assess liability and apply the common law – as "a State or political subdivision of a State." Indeed, a criminal jury is the principal **barrier** between a defendant and the State, rather than an arm of the state itself. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 & n. 23 (1968). Likewise, a civil judge and jury stand between the state and its citizens when the state is itself a party to a lawsuit.

This description would thus be a very unusual and awkward way to refer to a judge. *Compare Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (Age Discrimination in Employment Act, 29 U.S.C. § 630[f], needed to "plainly" refer to judges for it to apply to them; reference to an "appointee at the policymaking level" insufficient). Respondent's reading is even more strained here, as it would force this Court to conclude that a **federal** judge or a **federal** jury constitute a "State or [its] political subdivision" when a state common law suit is removed to federal court. It is no answer that the federal jury or judge in a tort case would be applying state law. Section 4306 refers to a "State" or its "political subdivision" as the **entities** that establish "a law or regulation." **Federal** juries and judges simply do not have that role in state tort actions.[1]

---

[1] As the Solicitor General notes, Respondent's construction of the Act would compel judges to apply to the Coast Guard under section 4305 for authority to continue a damages action. *See* U.S. Br. 19. Given the absurdity of this result, the most plausible reading of section 4306 is that it only requires executive officers of a State or political subdivision to apply for permission to "establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard." U.S. Br. 18-19.

2. Under section 4306, the only actor which can create "a [pre-empted] law or regulation" is a "State or political subdivision of a State." Under the 1969 act in *Cipollone*, by contrast, the pre-emption provision does not refer to the organs of state authority that impose "requirements"; rather, it broadly encompasses any "requirement . . . imposed under State law." *Cipollone*, 505 U.S. at 515 (quoting statutory language). Thus while the Court could broadly interpret "requirements" in *Cipollone* to include common law, a similar conclusion cannot be reached in the Boat Safety Act. Simply stated, common law may possibly be considered a "requirement . . . imposed under State law," while common law cannot be considered a "requirement" "establish[ed]" through "a law or regulation" instituted by "a State or political subdivision of a State." Even were there ambiguity on that question (as in *Gregory*), in light of the presumption against pre-emption, the requisite plain statement to pre-empt state tort claims is absent from the text of section 4306. *Gregory*, 501 U.S. at 467.

3. Section 4306 only pre-empts a law or regulation which conflicts with "a regulation prescribed under section 4302."

As shown in our initial brief (Br. Pet. 16-24) and in Part II.B. below, section 4306 contemplates pre-emption only when a properly enacted federal regulation has been established; it says nothing about pre-emption in the absence of federal action. This silence is telling since Congress was aware of product liability lawsuits at the time the Act was drafted, *see* Br. Pet. 6-7, yet did not provide a clear and manifest intent to pre-empt them in the absence of a federal regulation on point. Likewise, the Coast Guard was also

aware of propeller guard lawsuits at the time it considered whether to undertake regulatory action, App. 50-53, yet it never urged their pre-emption in the absence of a federal regulation on point either. "In the absence of a promulgated safety standard, the Act simply fails to address the need for [the safety device] at all." *Freightliner*, 115 S. Ct. at 1486. Common law claims concerning propeller guards are thus not pre-empted by the express terms of section 4306.

B. The Savings Clause of the Act Confirms that the Lewis' Claims Are Not Expressly Pre-empted.

While the legislative history shows an expressed intent to maintain common law actions, *see* Br. Pet. 6-7, Respondent has not produced any provision which simply states that "we intend to pre-empt common law." Rather, Respondent constructs a pre-emption argument by stretching the ordinary meaning of the terms in the pre-emption clause to cover common law claims (dispelled above) and then implying an unstated limitation into the savings clause to read it out of the Act. This result is inconsistent with the normal canon of statutory construction to give effect to every clause. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

1. Section 4311(g) is a savings provision which limits the pre-emptive scope of this Act.

1. The Act's savings provision, section 4311(g), states that "[c]ompliance" with standards or regulations issued under the Act "does not relieve a person from liability at common law or under State law." Respondent would have this Court believe that section 4311(g) "has nothing to do with preemption." Br. Resp. 15. To the contrary, the savings clause was a specific Congressional subcommittee amendment to "ma[k]e clear that this Act does not preempt state or common law." *See* Br. Pet. 6-7. Indeed, Respondent acknowledges that

the Congressional bill specifically referred to this section as the "Savings Provision" of the Act. Br. Resp. 7-8.[2]

Respondent's explanation for the savings clause's purpose is as unpersuasive as its recitation of legislative history is incomplete. Respondent contends that the savings clause merely provides that if a manufacturer undertakes an obligation, it must do so correctly or face potential liability. Br. Resp. 31-32. This reading renders section 4311(g) a nullity, since state law already recognizes that compliance with a legislative enactment does not prevent a finding of negligence where a reasonable person would take additional precautions. *See* RESTATEMENT (SECOND) OF TORTS § 288(C) (1965); *see also, Banks v. ICI Americas, Inc.*, 264 Ga. 732, 737 n. 6, 450 S.E. 2d 671, 675 n. 6 (Ga. 1994) (under Georgia law, "a manufacturer's proof of compliance with . . . federal regulations does not eliminate conclusively its liability for its design of allegedly defective products"). Thus under Respondent's limited reading, the savings clause only provides for that which the law already provides. Since it would be redundant for Congress to supply that which was already in the background established law, it must be assumed that Congress meant to accomplish something by this provision.

Respondent's interpretation also leads to the untenable position that negligent compliance through *adding* a propeller guard could constitute an actionable tort under the Act, while negligent compliance through *withholding* a guard does not. *See* Br. Resp. 32; Br. Resp. In Opp. 14, n. 8. **Congress stated no such distinction in the Act.** Moreover, a finding that a propeller guard was negligently installed or manufactured would (according to Respondent's logic) necessarily create a

---

[2] The presence of section 4311(g) further distinguishes this case from *Cipollone*, where the plurality relied on the **absence** of a savings provision as evidence that the statute at issue there pre-empts **some** damages actions. *Cipollone*, 505 U.S. at 523 n. 22. *Cipollone* also noted that the savings provision of the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4406 – whose wording is similar to section 4311(g) – broadly preserves damages actions. *Cipollone*, 505 U.S. at 518; *see also, id.* at 537 n. 2 (separate opinion).

common law "requirement" as to the proper materials, testing limits, design, quality, installation specifications, warnings, etc. concerning the propeller guard which was actually installed. Respondent would then presumably argue that such a common law action was also pre-empted since, like the claim for failure to provide propeller guards, the common law would purportedly coerce a "requirement" on Respondent which is "not identical to a regulation." Br. Resp. 16. Respondent's interpretation thus collapses under its own weight.

2. Respondent claims (Br. Resp. 29-30) that, because section 4311(g) refers to "State law" as well as "common law," it would render section 4306 a nullity if it were given the anti-preemptive effect that Petitioners place on it. But section 4311(g) speaks of the circumstances under which "a person" would be "relieve[d]" of "**liability** at common law or under State law," which is a clear reference to the consequences of a damages action. Thus section 4311(g) is not a reference to the entire body of state law. Instead, it relates to forms of damages liability whether pursuant to common law or statute (e.g., state product liability statutes, wrongful death statutes, state unfair practices law, etc.). These acts are not directly related to boat engines but rather are general in nature, and thus their preservation is not inconsistent with the pre-emption of state legislation specifically directed towards boat engine manufacturing. *Medtronic*, 116 S. Ct. at 2258 (tort law not pre-empted as it merely encompasses "the general duty of every manufacturer to use due care to avoid foreseeable dangers in its product"); *see also, Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988) ("the permission of incidental regulation is consistent with the preclusion of direct regulation").

2. Section 4311(g) preserves Petitioners' claims.

1. Respondent argues (Br. Resp. 32) that section 4311(g) merely provides for liability if a manufacturer complies with the Act; but that there can be no liability if there is no regulation or standard for the manufacturer to match. This conclusion defies the text of the Act. Since there is no Coast

Guard regulation on propeller guards, Respondent complies with the Act whether it provides a guard or not. This "[c]ompliance . . . does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g).[3]

2. The legislative history confirms that Congress preserved common law actions where the Coast Guard chose not to exercise its pre-emptive discretion. The Executive Director of the Boat Owners Association of the United States asked Congress to add a savings provision to the Act to ensure that "the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition." *See* Br. Pet. 6-7. Congress responded by adding an express savings clause, and commenting that "[o]f course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissable [sic] for its evidentiary value." *See* Br. Pet. 7.

---

[3] One of Respondent's *amici* relies upon three distinguishable cases to contend that "the Court has routinely given so-called 'savings' clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole." Br. General Motors ("G.M.") 25. Two of the cases analyzed statutes with pre-emption provisions much broader than section 4306. *See American Airlines v. Wolens*, 115 S. Ct. 817, 821 (1995) (pre-empting "any rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987) (pre-empting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *compare* 46 U.S.C. § 4306 (pre-empting "a law or regulation" which a "State or political subdivision of a state" has "establish[ed]" for a narrow class of safety standards or equipment requirements). G.M. also relies on *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (U.S. Jan. 26, 1998), which turned upon the unique history of land acquisitions from a particular Indian tribe, and an interpretation of a savings clause that would eviscerate the very land sale agreement in which it was contained. By contrast, as shown herein, the operation of common law is wholly consistent with the text, purpose, and history of the Boat Safety Act.

Thus, at the time of the bill's drafting, Congress was presented with the very question at issue in this case: the pre-emptive scope of the Boat Safety Act in the absence of an applicable federal regulation. Faced squarely with this issue, Congress did not enact or otherwise provide any "clear and manifest intent" to pre-empt such laws as is required to find pre-emption. *Cipollone*, 505 U.S. at 516. Rather its response pre-supposes that a manufacturer "complies" with the Act in the absence of a regulation, and that litigation can go forward in the absence of a promulgated standard. Respondent's silence on this point speaks volumes.

The *amicus curiae* brief of the Solicitor General lends further support to Petitioners' view that the Coast Guard has not taken the steps necessary to pre-empt common law actions here. According to the government, "the congressional intent to achieve uniformity was not so absolute as to leave no room for common law actions." U.S. Br. 27. This is because, in part, the Boat Safety Act "does not require the Secretary to issue regulations, but rather merely permits him to." U.S. Br. 29 (distinguishing the "field pre-emption" case of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 [1978]).[4] Thus both the legislative body which wrote the Act, *and* the regulatory agency which operates under it, acknowledge that there is no express pre-emption of common law claims in this case.[5]

---

[4] The Solicitor General declined to take a view on this question since he found that the Act does not expressly pre-empt *any* common law actions. U.S. Br. 10-12. The Coast Guard's no-pre-emption view – as expressed through the Solicitor General – is entitled to significant respect since this case is the Coast Guard's first pronouncement on the Act in this Court, and since it is consistent with the historic presumptions against pre-emption. *See* Br. Pet. 23.

[5] The Coast Guard's position on "kill switches" is identical, in that there is no federal regulation requiring them on boats. Although the Coast Guard has discouraged states from enacting a "prescriptive state rule requiring kill switches on motorboats, it has not taken the position that common law claims predicated on a failure by manufacturers to install such devices are preempted by federal law." U.S. Br. 20.

3. Respondent in effect wants it both ways: it acknowledges that the Act does not require (or prohibit) it from any action *vis-a-vis* propeller guards, but also argues that the Act precludes victims injured or killed by its products from recovering damages. It wants both the protections of the Act and freedom from the Act at the same time. Congress did not legislate such a result, however.

3. The effects of "common law" and "a law or regulation" are not identical.

1. Contrary to Respondent's assertions (Br. Resp. 22-29), damages actions do not exert a regulatory effect identical to positive law. A person who commits a common law tort is not violating a regulatory mandate or criminal statute; the tortfeasor is acting in a legal, but inappropriate way. The principal purpose of common law tort liability is thus to compensate victims; the effect which potential liability has on the tortfeasor is at best indirect. *See, e.g., Goodyear*, 486 U.S. at 185-186 ("[t]he effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of such an award provision"); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 256 (1984) (tort awards not pre-empted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards. . . . ")

The violator of "a law or regulation," by contrast, is subject to liability *per se*, to administrative remedies, or even to criminal penalty. The effect on its actions are direct, since "a law or regulation" mandates action or the forbearance of action. Indeed, if a manufacturer of a consumer product violates positive regulatory requirements, the product can usually be removed from the market forthwith. The purpose of "a law or regulation" is thus to mandate conduct, with victim compensation being a secondary (and often elusive) byproduct. *Compare* 46 U.S.C. § 4311(a)-(d) (penalties under the Boat Safety Act for violating chapter or regulations prescribed thereunder).

2. This Court has repeatedly recognized that the express pre-emption of state laws or regulations does not necessarily

mean that state tort actions are pre-empted, because the two are not identical in nature or effect. In *Cipollone*, for instance, seven members of the Court held that, **although the 1965 Act expressly pre-empted state regulatory law, it did not pre-empt common law**, noting that "[t]here is no general, inherent conflict between [express] federal preemption of state [regulatory] requirements and the continued vitality of state common law damages actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (concurrence). *See also, e.g., Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 626-628 (1996); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990); *Goodyear, supra*; *Silkwood, supra*.[6]

This conclusion is particularly *apropos* in the context of product liability claims. While strict products liability may seek to improve product safety, one of its core principles is that because some potentially dangerous products will inevitably cause harm on occasion, it is often beneficial to society as a whole both to keep the product on the market **and** to compensate injured parties through the tort system. *Prosser & Keeton on Torts* 536-57, 692-93 (4th ed. 1984); *Morris on Torts* 240-41 (2d ed. 1980).

II. PETITIONERS' CLAIMS ARE NOT IMPLIEDLY PRE-EMPTED

A. Petitioners' Claims Promote the Ultimate Purpose of the Boat Safety Act: "Safety".

Congress enacted the Boat Safety Act to provide for safe products and boat operation. *See* Br. Pet. 3-5. Congress placed the burden of creating safe products on the manufacturers because, prior to that time, the "industry readily admits that one-fourth of all boat manufacturers d[id] not comply with . . . the industry's self-imposed minimum standards." *Id.* at 4-5. Congress felt that "equity requires that the responsibility at the outset for providing the boatman with a safe boat must lie

---

[6] The Court need not reach the broader issue of common law's relation to a promulgated federal "law or regulation" since no propeller guard regulation exists here. *See Freightliner*, 115 S. Ct. at 1487, n. 3.

with the manufacturer." *Id.* at 3-4. Congress considered this piece of safety legislation appropriate since "[s]imilar federal legislation exists with regard to other products, including aircraft and motor vehicles." *Id.*[7]

This Act was also developed against the backdrop of existing common law, which has historically had input on safe product designs. In the case of boats, Congress knew that "[c]ourts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with 'seaworthiness' under maritime law." *See* Br. Pet. 7, n. 2 (testimony of Coast Guard Commandant in regard to the adoption of the savings clause). Indeed, it was well established by that time that the unseaworthiness doctrine was a "species of liability without fault." *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946). Thus common law was accepted to be compatible with federal boat regulation prior to the adoption of the Act, and its presence was recognized by Congress during the drafting of this legislation. *See* Br. Pet. 6-7. The lack of any "clear and manifest intent" to displace this historic remedy confirms that Congress did not mean to cavalierly or circuitously pre-empt it. *See Yamaha*, 116 S. Ct. at 628 (state "wrongful death" remedies are not pre-empted in case of nonseafaring accidents).

Respondent seizes upon Congress' desire to "encourag[e]" uniformity (*see* Br. Pet. 4), however, to broadly urge

---

[7] As was stated when the bill was introduced for adoption:

> Over the last 5 years about 1,350 people each year have been killed while engaged in recreational boating. Excluding cars, this is a larger figure than for any other mode of transportation including civil aviation. Most deaths occur when boats capsize or people fall overboard. Boat safety requires that manufacturers construct their boats in such a way as to minimize these dangers.

117 Cong. Rec. 23,958 (July 8, 1971) (statement of Representative Latta). Thus the federal interests at stake in the Boat Safety Act are no different than in the federal interests behind the National Traffic and Motor Vehicle Safety Act of 1966 considered by this Court in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995).

that uniformity is the *ultimate* purpose of the Act. The main purpose of the Boat Safety Act, however, is *safety*. Common law actions help to promote this goal by identifying safer products and raising public awareness of the danger of unguarded propellers. Thus its operation encourages Congress' prime interest in this piece of legislation. Indeed, since Congress expressly commanded that common law liability survives pre-emption, it would frustrate Congressional purposes *to* pre-empt it here.

B. Congress Intended Only to "Encourage" the Goal of Uniformity, and Provided That It Be Encouraged Through the Actual "Establishment" of Standards.

1. Respondent is correct in stating that Congress gave the Coast Guard permissive authority to create uniform minimum construction standards through the "establishment" of federal standards. Br. Resp. 5, 14. Respondent stretches this argument, however, to assert that this desire to encourage uniformity pre-empts all common law claims *even in the absence of an "establish[ed]" federal regulation*. This slight-of-hand is incongruous with the text and history of the Act, however, and is contrary to this Court's prior decision in the analogous *Freightliner* case.

Congress clearly granted the Coast Guard the power to flex its pre-emptive muscle, *if it chose to do so*, through the actual enactment of regulations in accordance with the well-defined procedures of both section 4302 and the Administrative Procedure Act ("APA"). *See* Br. App. 5. Congress *required* that, in order to "establish" pre-emptive regulations, the Coast Guard must follow the terms of both section 4302 and the APA. *Id.* Congress further provided that, if any party is adversely affected by a standard prescribed under the Act, the aggrieved person is entitled to seek judicial review of the standard under the APA. *Id.*

In the case of propeller guards, the Coast Guard chose not to undertake the actions required to exercise its regulatory authority. Since it did not exercise its pre-emptive authority

as permissively granted to it by Congress, in the manner set forth by Congress, it is clear that Congressional purpose is not frustrated by the exercise of common law. Indeed Congressional purpose would be frustrated by the pre-emption of common law claims here, since the Act predicates all pre-emptive authority (and the right to seek protection from its exercise) upon the actual *enactment* of a federal regulation.

2. The flaw in Respondent's argument is thus exposed when it states that the savings cause would allegedly "defeat the statutory goal of *creating* uniform national boat construction and performance standards." Br. Resp. 45 (emphasis added). There is no frustration of any statutory goal here, however, since the Coast Guard *will still be free to create regulations in this area if it so chooses*. U.S. Br. 26-27.

The Supremacy Clause's purpose – enshrined in the Constitution at least a century before the rise of our national economy – is not to provide for uniformity among the states, but to establish the preeminence of federal law when necessary to support federal interests in the enforcement of national laws. *See, e.g., Medtronic*, 116 S. Ct. at 2257 ("it is impossible to ignore . . . [the] overarching concern [of the statutory and regulatory language] that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest"). In this Act, the federal interest is expressed through the Coast Guard's promulgation of national regulations in the manner expressly set forth by Congress. Since the Coast Guard chose not to prescribe a regulation under section 4302 and the APA as the Act dictates, the federal government has not expressed a pre-emptive interest concerning propeller guards (a conclusion which is forcefully underscored by the Coast Guard's position before this Court). *See Freightliner*, 115 S. Ct. at 1486. Petitioners' common law actions are simply not a bar to the full implementation of any federal propeller guard goal, *if and when the Coast Guard chooses to enunciate one*.

3. Respondent concedes that section 4311(g) "indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal safety standard." Br.

Resp. In Opp., 13. Respondent, apparently recognizing that its case hinges on establishing a "field pre-emption" argument, asserts that Congress intended to pre-empt the narrower field of "boat construction standards and equipment requirements." Br. Resp. 7. As noted above, however, there is no "field pre-emption" in this case since Congress expressly required the Coast Guard to actually prescribe regulations to flex its pre-emptive muscle. Pet. Br. 16-24; *see also, Freightliner*, 115 S. Ct. at 1486.

C. In the Absence of the "Establishment" of Federal Standards, Congress Intended Common Law Actions to Remain Viable.

1. Respondent argues (Br. Resp. 7) that courts should not allow a hodgepodge of requirements on boat manufacturers. Yet Respondent does not deny that the Coast Guard's decision to neither require nor prohibit propeller guards allows manufacturers to provide a myriad of guard designs, or no guards at all, in any hodgepodge manner they elect. Indeed, as noted in our opening brief (Br. Pet. 8-9) – and unchallenged by Respondent – a large number of propeller guards are presently marketed by manufacturers other than Respondent, further undermining Respondent's argument that this Court should affirm in the interest of "uniformity."[8]

---

[8] Respondent argues (Br. Resp. 33-34) that manufacturers may be subjected to inconsistent "requirements" if their products operate in waters bounding two states, and thus common law claims should be pre-empted "by the Supremacy Clause." As noted above, the Supremacy Clause's purpose is not to create uniformity in-and-of itself, but to carry out federal interests. This Court rejected an identical argument in *Freightliner*, whose holding ultimately allowed for 18-wheel trucks (whose very purpose is interstate travel and commerce) to face potentially conflicting common law liabilities in various states for their use or non-use of anti-lock brake systems ("ABS"). This result was necessitated since there was no federal ABS regulation extant and thus "[a] finding of liability against [manufacturers] would undermine no federal objectives or purposes . . . since none exist." 115 S. Ct. at 1488.

2. Respondent admits that it can comply with both federal and state law, Br. Resp. 34, n. 24, so the analysis turns to whether common law actions would somehow frustrate the purposes of Congress here. Since the Coast Guard has neither required nor prohibited propeller guards, the question becomes whether Congress intended the courts to play any role in the matter or to be mere spectators. The text of the Act establishes that Congress intended the courts to play a role in the absence of federal regulation, and the history of tort law confirms that the courts are well suited and trustworthy to handle this public safety responsibility.

Indeed it is illogical to suggest that common law cannot assist in identifying feasible designs, given that the Coast Guard's adoption of a recommendation not to undertake regulatory action rested in part on concerns over costs, difficulty in retrofitting, and the purported lack of an available universal design which would fit the thousands of possible hull/propulsion unit combinations. App. 71, 163. If safer designs cannot be identified through product liability litigation, and manufacturers cannot be encouraged to provide such guards voluntarily through the tort system, this same quandary will always haunt the Coast Guard or indeed any regulatory agency charged with monitoring product safety.

3. Perhaps more importantly, courts have procedural and substantive guidelines by which these issues are routinely resolved. Manufacturers, by contrast, are businesses whose motivation is almost invariably the "bottom line," and absent tort law would operate in a wholly unregulated way, free (they contend) from liability whatsoever. More to the point, one of the reasons Congress had to enact the Boat Safety Act in the first place was because the "industry readily admits that one-fourth of all boat manufacturers do not comply with . . . the industry's self-imposed minimum safety standards." As Judge Learned Hand observed, an industry "never may set its own tests, however persuasive be its usages. . . . [T]here are precautions so imperative that even their universal disregard will not excuse their omission." *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir.), *cert. den'd*, 287 U.S. 662 (1932).

4. Respondent's uniformity argument is thus based upon the invalid assumption that only manufacturers can determine the feasibility of propeller guards and that there is no role for the courts. Contrary to this unsupported assertion, Congress was fully cognizant of product liability claims at the time of the Act but did not evidence a "clear and manifest intent" to pre-empt their historic role in this field. This is because common law promotes, and does not undermine, the Congressional purposes established in the Act.

D. The Coast Guard Did Not Find that Propeller Guards Are Inherently Unsafe or Should Be Banned.

1. As the Solicitor General noted, "Respondent [in its Brief in Opposition to Certiorari] overstates what the Coast Guard decided with respect to propeller guards." U.S. Br. 25, n. 17. Undaunted, Respondent again overreaches on this point in its merits brief. Br. Resp. 11. The Coast Guard asked the National Boating Safety Advisory Counsel ("NBSAC") to consider whether it should "move toward a federal regulation for some form of propeller guard." App. 76. NBSAC delegated this task to an advisory subcommittee, which could not resolve all questions concerning cost, retrofitting, and the availability of a universal guard design which could be mandated for all boats. Faced with these unanswered questions, the subcommittee merely recommended that "no regulatory action" be taken on the subject. App. 73. The Coast Guard, based upon this recommendation, took no regulatory action under section 4302.

Respondent relies upon the advisory subcommittee's statement that propeller guards might possibly cause injuries themselves, and attempts to parlay this into a purported conclusion that propeller guards are inherently dangerous. Br. Resp. 11. While it is true that "[a]ll machinery or objects, whether created by man or nature, can inflict injury," App. 68, there is no evidence in the record of anyone ever actually being injured by a propeller guard. By contrast, the Red Cross estimates that more than 3,600 people are killed or injured by motorboat

propellers on average ***every year***. App. 198. Indeed, Respondent admits that its unguarded, open-screw propeller blade may be an open and obvious danger. App. 23.

If the Coast Guard had found all propeller guards to be inherently dangerous, as Respondent would have this Court believe, it would have been the Coast Guard's duty to ban such products and stop them from being sold as aftermarket accessories. It also would have presumably warned the users of such products that they were using inherently dangerous products.[9] Contrary to Respondent's position, the Coast Guard declared (in the *same* letter adopting the recommendation to take no regulatory action) that "[a] series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. *Topics could include, for example . . . , available propeller guards. . . .* " App. 165 (emphasis added).

2. Also, contrary to Respondent's assertions, the record reflects that the technology required to protect swimmers from propeller injuries has existed since at least 1970. App. 210. Respondent's own principal engineer for motorboat product evaluation concluded in a 1988 internal memorandum that "we are very close to the solution of what needs to be the configuration of the prop guard." App. 214-215. At least 21 patents have been awarded for propeller guards since 1910, which itself generates a presumption that the inventions are feasible. App. 205-206. Propeller-less water pump ("jets") propulsion devices are currently sold in the marketplace as well, and Respondent has tested such products since at least 1973. App. 202-204. The devices sought by Petitioners are thus products which are sold in the marketplace; which are used by consumers (including various branches of the United States Government and the State of California); and which Respondent has been testing for at least 25 years. App. 213-218.[10]

---

[9] Users referenced in the subcommittee report include the United States Navy and Marines; rescue teams in California, New Zealand and Australia; and over 2,000 owners of "Chadwell" ring guards. App. 62-64.

[10] Contrary to Respondent's assertion, Br. Resp. 12, not all courts have concluded that there is no feasible propeller guard available to protect

* * *

Respondent's interpretation of the Act – that all common law actions are pre-empted where the Coast Guard has considered a safety item but not issued a final regulation – would pre-empt actions on all safety features where the Coast Guard published a notice of proposed rulemaking (or otherwise recognized its existence) but ultimately, for whatever reason, did not enact a final regulation. Thus, all common law actions for safety items such as neutral returns, "kill switches," and other safety innovations on boats would be pre-empted as well. The implications of Respondent's assertions thus go well beyond the compensation of Kathee Lewis' parents in this single case; it would deprive countless victims of boat-related torts from seeking compensation and assisting in the identification of safer products. Congress did not legislate such a devastating and abhorrent result.

III. CONCLUSION

For the reasons stated in our briefs, the decision below should be reversed and the case remanded for trial.

Respectfully submitted,

DAVID E. HUDSON*
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
Suite 700 – SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481

R. BENJAMIN HOGAN, III
HOGAN, SMITH & ALSPAUGH
2323 Second Avenue North
Birmingham, Alabama 35203
(205) 324-5635

* *Counsel of Record*

---

victims in the water. *See, e.g., Fitzpatrick v. OMC*, No. 82-9635 (Pa. Ct. Of Common Pleas, Jan. 28, 1985) (*see* App. 240-241). Also, as the record reflects, Respondent's argument is misleading due to the number of lawsuits which settle for undisclosed amounts of money (App. 239) and the number of summary judgments manufacturers have obtained on the pre-emption issue (as in this very case). *See* App. 247-254.

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

6

No. 97-288

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED, PETITIONERS

v.

BRUNSWICK CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

37 pp

QUESTION PRESENTED

Whether petitioners' state common law tort action, based on the respondent's failure to install a propeller guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. 4306, or by the decision of the Secretary of Transportation to take no regulatory action to require the installation of propeller guards on recreational boats.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	10
Argument:	
Petitioners' claims are not preempted by either the Federal Boat Safety Act or the Coast Guard's decision not to promulgate a propeller guard regulation	12
A. The text of the Act does not support a finding of express preemption of petitioners' common law claims	13
B. The Coast Guard's decision not to regulate propeller guards does not impliedly preempt state common law tort claims alleging that the manufacturer should have installed a propeller guard	25
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983)	27, 28
Becker v. *U.S. Marine Co.*, 943 P.2d 700 (Wash. App. 1997)	19
Beech v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991)	19, 24
Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947)	28
Boatland of Houston, Inc. v. *Bailey*, 609 S.W.2d 743 (Tex. 1980)	20
Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989)	28

Cases—Continued: Page

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 13, 27
Calabro v. *Outboard Marine Corp.*, 599 So. 2d 717 (Fla. Ct. App. 1992) 24
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 17, 18
City of Chicago v. *Environmental Defense Fund*, 511 U.S. 328 (1994) 21
Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 19
Degen v. *Bayman*, 241 N.W.2d 703 (S.D. 1976) 19, 24
Detroit Marine Eng'g v. *McRee*, 510 So. 2d 462 (Miss. 1987) 19
Dubecky v. *S2 Yachts, Inc.*, 651 N.Y.S.2d 602 (App. Div. 1996) 19
English v. *General Elec. Co.*, 496 U.S. 72 (1990) 19, 22, 25
Fitzpatrick v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) 19
Freightliner Corp. v. *Myrick*, 514 U.S. 280 (1995) ... 9, 16, 25, 26, 27, 28
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 22
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 25, 26, 28
Keene Corp. v. *United States*, 508 U.S. 200 (1993) .. 21
Medtronic, Inc. v. *Lohr*, 116 S. Ct. 2240 (1996) 13, 28
Moss v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) 19
Napier v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) 29
Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988) 27, 28
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 28, 29
Rose v. *Mercury Marine*, 483 So. 2d 1351 (Miss. 1986) 19

Cases—Continued: Page

Ryan v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997) 19
Seymour v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) 24
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 22
United States v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) 23
Van Berkum v. *Christian*, 530 N.E.2d 52 (Ill. App. 1988) 19
Veal v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) 24
Young v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) 19, 20

Statutes and regulations:

Act of June 9, 1910, ch. 268, §§ 2-6, 36 Stat. 462-463 ... 2
Act of June 7, 1918, ch. 93, 40 Stat. 602 2
Act of Apr. 25, 1940, ch. 155, 54 Stat. 163 2
Administrative Procedure Act, 5 U.S.C. 553 5
Federal Boat Safety Act of 1971, Pub. L. No. 92-75, 85 Stat. 213:
§ 2:
85 Stat. 213-214 4
85 Stat. 214 4
§ 9, 85 Stat. 217 15
§ 10, 85 Stat. 217 15
Federal Boat Safety Act of 1971, 46 U.S.C. 4301-4311 1
46 U.S.C. 4302 ..... 5, 13, 16, 18
46 U.S.C. 4302(a) 1, 20, 29
46 U.S.C. 4302(a)(1) 11, 13
46 U.S.C. 4302(c)(1) 5
46 U.S.C. 4302(c)(2) 5
46 U.S.C. 4302(c)(3) 5
46 U.S.C. 4302(c)(4) 5
46 U.S.C. 4306 ..... 8, 10, 11, 13, 14, 16, 17, 18, 21, 22
46 U.S.C. 4311(g) 8, 11, 21, 22, 24

Statutes and regulations—Continued: Page

Federal Boating Act of 1958, Pub. L. No. 85-911, 72 Stat. 1754:
§ 9, 72 Stat. 1757 2
§ 13(4), 72 Stat. 1758 2
National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* 10, 16
15 U.S.C. 1392(d) (1988) 16
Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 29
46 U.S.C. 391a(3) (1976) 29
17 U.S.C. 301(a) 23
29 U.S.C. 1144(c)(1) 23
46 U.S.C. 3703(a) 29
46 U.S.C. 13110(b)(1)(A)-(C) 6
33 C.F.R.:
Pt. 173 5
Pt. 174 5
Pt. 175 5
Pt. 177 5
Pt. 179 5
Pt. 181 5
Pt. 183 5
Pt. 187 5
49 C.F.R. 1.46(n)(1) 5

Miscellaneous:

Department of Transportation, Office of the Secretary, Exemption to Preserve Certain State and Local Boat Safety Laws and Regulations, August 11, 1971 15
36 Fed. Reg. (1971):
p. 15,764 15
p. 15,765 15
38 Fed. Reg. (1973):
p. 71 15
p. 6914 15
60 Fed. Reg. 25,191 (1995) 8, 24
61 Fed. Reg. 13,123 (1996) 8

Miscellaneous—Continued: Page

62 Fed. Reg. (1997):
p. 22,991 8
p. 44,507 8
H.R. Rep. No. 1162, 61st Cong., 2d Sess. (1910) 2
H.R. Rep. No. 361, 65th Cong., 2d Sess. (1918) 2
H.R. Rep. No. 324, 92d Cong., 1st Sess. (1971) 14
Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990) 7
National Association of State Boating Law Administrators, *Reference Guide to State Boating Laws* (Ron Sarver & Chris Moore, eds., 2d ed. 1997) 3
National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 4, 22
Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 4
S. Rep. No. 676, 76th Cong., 1st Sess. (1939) 2
S. Rep. No. 2340, 85th Cong., 2d Sess. (1958) 3
S. Rep. No. 248, 92d Cong., 1st Sess. (1971) 3, 4, 5, 14, 20, 21, 22
Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357 (1984) 23
Webster's Third New International Dictionary (1986) 18

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-288

VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED, PETITIONERS

v.

BRUNSWICK CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Federal Boat Safety Act of 1971, 46 U.S.C. 4301-4311, authorizes the Secretary of Transportation to promulgate appropriate federal safety standards for recreational boats. 46 U.S.C. 4302(a). This case concerns the preemptive effect of the Secretary's decision not to take any regulatory action requiring boat manufacturers to install propeller guards on motorboats. The Court's decision may have a substantial effect on the manner in which the Secretary exercises his regulatory authority under the Act.

STATEMENT

1. a. For much of this century, Congress has imposed statutory requirements to promote motorboat safety. In 1910, for example, Congress enacted a requirement that

motorboats of specified sizes carry lights and safety equipment. See Act of June 9, 1910, ch. 268, §§ 2-6, 36 Stat. 462-463. The purpose of that law was to "prevent[] collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." H.R. Rep. No. 1162, 61st Cong., 2d Sess. 1 (1910). A law passed in 1918 required motorboats to be numbered, in part to facilitate enforcement of the safety requirements imposed by the 1910 statute. See Act of June 7, 1918, ch. 93, 40 Stat. 602; see also H.R. Rep. No. 361, 65th Cong., 2d Sess. 1 (1918).

In 1940, Congress promulgated a major overhaul of the existing requirements concerning motorboats. See Act of Apr. 25, 1940, ch. 155, 54 Stat. 163. The principal purposes of that law were to expand the definition of "motorboat," to provide for local inspectors to ensure compliance with equipment and design requirements, and to impose penalties on persons who operated motorboats in a reckless or negligent manner. *Ibid.*; see also S. Rep. No. 676, 76th Cong., 1st Sess. (1939). In 1958, Congress enacted further boat numbering requirements and declared it "to be the policy of Congress to encourage uniformity of boating laws, rules, and regulations as among the several States and the Federal Government to the fullest extent practicable, subject to reasonable exceptions arising out of local conditions." Federal Boating Act of 1958, Pub. L. No. 85-911, § 9, 72 Stat. 1757. Because that law contemplated a system of state numbering of vessels, it had to address the coordination of jurisdiction between States and the Federal Government. Congress provided that "[n]othing herein shall interfere with, abrogate or limit the jurisdiction of any State" with respect to its numbering system. *Id.* § 13(4), 72 Stat. 1758. The Department of Treasury's

comments on the proposed legislation reflect agreement with that scheme:

> The relinquishment by the Federal Government to the States of a portion of its traditional control of motorboating appears to be a logical and healthy approach to the partial solution of the vast problem of recreational boating safety. The magnitude and complexity of adequate control and the encouraging response of State governments dictate coordination and continuing cooperation between sovereign governments in this field.

S. Rep. No. 2340, 85th Cong., 2d Sess. 5 (1958).

By the early 1970s, approximately 40 million Americans were engaging in recreational boating activities each year in approximately 9 million boats. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971).[1] That widespread participation came at a cost, as nearly 7,000 persons lost their lives in boating accidents during the period 1966-1970. *Id.* at 7. In response to those developments, Congress enacted the Federal Boat Safety Act (FBSA) in 1971 "to provide a coordinated national boating safety program involving both the Federal Government and the States * * * [in] a single comprehensive Act dealing with the subject of safety for boats used principally for other than commercial use." *Id.* at 6. Congress intended "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is

---

[1] The number of registered recreational boats in the United States today is approximately 12 million. National Association of State Boating Law Administrators, *Reference Guide to State Boating Laws* 6 (Ron Sarver & Chris Moore, eds., 2d ed. 1997).

operating—presently the Secretary of Transportation." *Ibid.*

Congress further declared "the purpose of this Act to improve boating safety * * * by encouraging and assisting participation by the several States, the boating industry, and the boating public in [the] development of more comprehensive boating safety programs; by authorizing the establishment of national construction and performance standards for boats and associated equipment; and by creating more flexible regulatory authority concerning the use of boats and equipment." Pub. L. No. 92-75, § 2, 85 Stat. 213-214.[2] Congress also sought "to encourage greater and continuing uniformity of boating laws and regulations as among the several States and the Federal Government, a higher degree of reciprocity and comity among the several jurisdictions, and closer cooperation and assistance between the Federal Government and the several States in developing, administering, and enforcing Federal and State laws and regulations pertaining to boating safety." *Id.* at 214.

To accomplish those goals, the Act authorizes the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats and associated equipment. See 46 U.S.C. 4302. The Secretary has delegated that rulemaking authority to the Coast Guard. See 49 C.F.R. 1.46(n)(1). In promulgating regulations, the Coast Guard must consider the extent to which the regulations will contribute to recreational vessel safety. 46 U.S.C. 4302(c)(1) and (2). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C. 4302(c)(3). Before promulgating a regulation, the Coast Guard must consult with the National Boating Safety Advisory Council (Advisory Council) on the need for regulation and must comply with the notice and comment provision of the Administrative Procedure Act, 5 U.S.C. 553. 46 U.S.C. 4302(c)(4); see S. Rep. No. 248, *supra*, at 19.[3]

b. The question presented by this case is whether the Coast Guard's decision *not* to promulgate a regulation requiring manufacturers to install propeller guards on recreational motorboats preempts a state common law damages action premised on an allegedly negligent failure

---

[2] The Senate report states: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. No. 248, *supra*, at 14. A number of government witnesses in support of the Act emphasized the need for uniform federal construction and equipment standards. See, *e.g.*, *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 50 (1971) (Admiral Chester R. Bender, Commandant of the Coast Guard); *id.* at 70 (John H. Reed, Chairman, National Transportation Safety Board); *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 66 (1970).

[3] The Coast Guard has promulgated numerous regulations regarding boat safety, specifying equipment to be carried on boats, and mandating design standards for minimum safety requirements. Those regulations address a range of different topics, including: vessel numbering and accident reporting, see 33 C.F.R. Pts. 173, 174; requirements for safety equipment to be carried on boats, such as personal flotation and visual distress signal devices, see *id.* Pt. 175; measures to correct especially hazardous conditions, *id.* Pt. 177; defect notification requirements, *id.* Pt. 179; requirements for manufacturers concerning certifications of compliance, identification of boats, and instructions for personal flotation devices, *id.* Pt. 181; requirements regarding safe boat capacity and flotation devices, and standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, *id.* Pt. 183; and vessel identification requirements, *id.* Pt. 187.

by the manufacturer to install such a guard. In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and safety advantages and disadvantages of requiring propeller guards on recreational boats.[4] The Advisory Council appointed a Propeller Guard Subcommittee for that purpose. After an extensive review of scientific data and testimony, the Subcommittee determined that the incidence of injuries or fatalities caused by persons coming into contact with propellers was relatively small. See J.A. 92. The Subcommittee also found that propeller guards adversely affect the operation of boats at certain speeds and that such devices could create additional and more severe hazards. See J.A. 69-71. The Subcommittee further concluded:

> Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

J.A. 71. Therefore, it recommended that the Coast Guard "should take no regulatory action to require propeller guards." J.A. 73.

The Advisory Council accepted the report and adopted its recommendations. See Pet. App. A8. The Coast Guard,

---

[4] The Advisory Council must consist of 21 members, equally divided among representatives of "State officials responsible for State boating safety programs," "recreational vessel manufacturers and associated equipment manufacturers," and "national recreational boating organizations and * * * the general public." 46 U.S.C. 13110(b)(1)(A)-(C).

in turn, also accepted the report's recommendations. J.A. 163-167. In a letter to the Advisory Council agreeing with its recommendation that the Coast Guard "should take no regulatory action to require propeller guards," the Coast Guard Chief of the Office of Navigation Safety and Waterway Services wrote:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council 1 (Feb. 1, 1990) (Coast Guard Letter), J.A. 163.

In recent years, the Coast Guard has continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "the public's present feelings about the use of propeller guards or possible alternatives to

propeller guards on these vessels," a request occasioned by a serious accident involving a rented houseboat. 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued an ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. See *id.* at 44,507. The Coast Guard has not issued any regulations to require or prohibit propeller guards in any vessels.

c. Two provisions of the FBSA speak to the preemption issue in this case. The preemption clause of 46 U.S.C. 4306 states that, unless permitted by the Secretary, "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed [by the Coast Guard] under section 4302 of this title." The second pertinent provision, 46 U.S.C. 4311(g), is a savings clause. It states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[5]

[5] Notwithstanding the existence of federal statutory requirements regarding certain aspects of motorboat safety, none of the congressional acts prior to the FBSA in 1971 contained either a preemption clause or a savings clause. See statutes cited at pages 1-3, *supra*.

2. Gary and Vicky Lewis sued respondent Brunswick Corporation in state court to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and was then struck by a Brunswick engine propeller. Petitioners' complaint alleged that the Brunswick engine was defective because it lacked a propeller guard. See J.A. 6-9. Respondent removed the case to federal court on diversity grounds and moved for summary judgment. The district court held that the Lewises' claims are preempted by the FBSA, Pet. App. A31, and the Eleventh Circuit affirmed, *id.* at A1-A25.

The court of appeals rejected the contention that the Lewises' claims are expressly preempted. It stated that "the conflicting language in the preemption and savings clauses" prevented a finding that Congress clearly intended to preclude common law claims. Pet. App. A14. The court also held that this tension between the preemption clause and the savings clause prohibited a finding that Congress expressly intended to save those claims. *Ibid.* As a result, the court held that its decision about preemption depended on whether the Lewises' claims are impliedly preempted by federal law. *Id.* at A15.

In analyzing that question, the court sought to determine whether the Lewises' claims would "prevent or hinder the FBSA from operating the way Congress intended it to operate." Pet. App. A15. The court concluded that at the heart of the regulatory scheme established by the FBSA was Congress's decision to make the Coast Guard the "exclusive authority to issue safety standards." *Id.* at A18. That conclusion led the court to hold that "an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate." *Id.* at A20. The court found distinguishable this Court's decision in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286 (1995), which held that the failure by the National Highway

Transportation Safety Administration (NHTSA) to promulgate a regulation on antilock brakes under the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), 15 U.S.C. 1381 *et seq.*, did not preempt state common law claims based on the failure to install such brakes on a tractor trailer truck. The court of appeals stated that the NTMVSA, in contrast to the FBSA, did not give the responsible federal agency (NHTSA) the exclusive authority to issue safety standards, but clearly allowed States to impose safety standards on auto manufacturers until the Federal Government came forward with a different standard. Pet. App. A18.

The court of appeals acknowledged that, "[f]rom the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme." Pet. App. A21. But it decided that only "product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers," would be consistent with the FBSA scheme. *Id.* at A22. By contrast, the court found that "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA." *Ibid.* Consequently, the court held, the Coast Guard's decision not to impose a propeller guard requirement "impliedly preempts state law requirements of propeller guards, even in the form of common law claims." *Id.* at A24.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that the express preemption provision in the Federal Boat Safety Act of 1971 (FBSA), 46 U.S.C. 4306, does not preempt petitioners' common law claims. As an initial matter, the Court need not resolve a broader ground of disagreement between the

parties: whether Section 4306 preempts state prescriptive regulations in the absence of a federal rule or regulation. This case involves not a state positive rule, but rather a common law damages action. Section 4306 contains four textual indications that Congress did not intend to foreclose such claims. First, as this Court has noted in a number of cases, courts should not infer that use of the word "law" in the preemption provision includes common law claims absent a clearer indication of that purpose by Congress. Second, the FBSA provides that only a "law or regulation" promulgated by a "State or political subdivision of a State" is subject to express preemption. A court in a common law damages action does not fall within the ordinary meaning of "State or political subdivision of a State" because state judicial officers do not petition the Secretary of a federal department for permission to proceed with a state lawsuit. That reading is consistent with the Coast Guard's practice since 1971 of working with state executive officials to determine whether state laws or regulations conflict with federal standards. Third, the Secretary's permissive authority to promulgate "minimum safety standards" (46 U.S.C. 4302(a)(1)) does not foreclose state tort law judgments that raise the manufacturer's standard of care above the federally required minimum. Finally, the savings clause of 46 U.S.C. 4311(g) *does* expressly contain an intent to preserve "common law" claims. Inclusion of that language in the savings clause but not in the preemption provision further supports a reading that the preemption clause was not intended expressly to preempt state common law claims.

Although the court below correctly concluded that the preemption clause does not expressly preempt petitioners' claims, it erred in ruling that those claims are impliedly preempted by the statutory scheme. Since the Coast Guard concluded after extensive study that the available

data were insufficient to warrant imposition of a regulation regarding propeller guards, there is no federal standard with which a state common law action would conflict. Similarly, a common law tort claim does not defeat the purposes of the Act, since the Coast Guard can promulgate any regulation regarding propeller guards in the future, if the appropriate justifications exist.

ARGUMENT

PETITIONERS' CLAIMS ARE NOT PREEMPTED BY EITHER THE FEDERAL BOAT SAFETY ACT OR THE COAST GUARD'S DECISION NOT TO PROMULGATE A PROPELLER GUARD REGULATION

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. * * * Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citations omitted). The court below correctly held that petitioners' claims are not expressly preempted by the Federal Boat Safety Act of 1971 (FBSA), but it erred in holding that those claims are impliedly preempted by the

Coast Guard's decision not to promulgate a regulation concerning propeller guards.

A. The Text Of The Act Does Not Support A Finding Of Express Preemption Of Petitioners' Common Law Claims

1. As with the interpretation of any statutory text, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240, 2250 (1996). Indeed, although the existence of an express preemption clause does not negate the need for an analysis of implied preemption, see *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-289 (1995), "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The preemption clause at issue in this case, 43 U.S.C. 4306, provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4302, in turn, provides in pertinent part that "the Secretary *may* prescribe regulations establishing mini-

mum safety standards for recreational vessels and associated equipment." 46 U.S.C. 4302(a)(1) (emphasis added).

2. The preemption clause of Section 4306 is susceptible of at least two interpretations. One is that States cannot enact positive rules or regulations without the approval of the Secretary, regardless of whether a federal standard is in effect. That reading appears to be favored by respondent. See Br. in Opp. 20. It is supported by the introductory clause of the section, which provides that, "[u]nless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish * * * a law or regulation establishing a[n] * * * equipment performance * * * standard." 46 U.S.C. 4306. The legislative history provides further support for that interpretation. The Senate Report states: "This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. No. 248, *supra*, at 20.[6]

The Coast Guard has long interpreted the provision to preempt state positive laws and regulations, even when there is no counterpart federal regulation in effect under the Act. The day after the FBSA was enacted, the Secretary of Transportation issued a statement exempting all

[6] The House report, which accompanied a bill that did not contain a savings provision, went even further in describing the preemptive effect of the proposed legislation: "The bill preempts the field on boating standards or regulations. Subject to review by the Secretary, however, States may require certain marine articles to meet uniquely hazardous situations in their States." H.R. Rep. No. 324, 92d Cong., 1st Sess. 11 (1971); see also *id.* at 15-16.

existing state laws from preemption under Sections 9 and 10 of the FBSA. The Secretary explained that "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations of the various States and political subdivisions until new boating safety regulations are issued under the Federal Boat Safety Act of 1971." Department of Transportation, Office of the Secretary, Exemption [from Section 10 of the Federal Boat Safety Act] to Preserve Certain State and Local Boat Safety Laws and Regulations, August 11, 1971. See 36 Fed. Reg. 15,764, 15,765 (1971). The Secretary further explained that "[t]his exemption applies only to laws and regulations in effect on the effective date of the Federal Boat Safety Act of 1971 and remains in effect until expressly superseded, revoked, or otherwise terminated." *Ibid.* Two years later, after issuing regulations pertaining to "Manufacturer Requirements" and "Boats and Associated Equipment," the Coast Guard superseded the 1971 general exemption from preemption with a more limited exemption that had the effect of preempting a range of previously exempted state statutes and regulations. See 38 Fed. Reg. 71, 6914 (1973). Subsequent correspondence from the Coast Guard has been consistent with the view that the FBSA preempts state-promulgated rules and regulations regardless of whether a federal standard is in existence.[7]

[7] See, *e.g.*, J.A. 37-38 (letter from Coast Guard to New York Commissioner of Parks and Recreation regarding federal preemption of associated equipment requirements imposed by state navigation law); J.A. 39-40 (internal Coast Guard memorandum regarding comparison of state boating law equipment standards for preemption purposes); J.A. 41-43 (letter from Coast Guard to Illinois Department of Conservation regarding preemption of state fire extinguisher regulations). See also pages 19-20, *infra* (discussing kill switches).

A second possible interpretation of Section 4306 would permit state regulations to exist in the absence of a federal standard, on a reading that focused on the last clause of Section 4306: that a State may not establish a regulation "that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. 4306. Petitioners espouse that reading of the statute. See Pet. 9. Under that interpretation, a federal regulation would have to be in effect before a state law could be preempted by Section 4306.[8] The Coast Guard has not issued formal regulations requiring or prohibiting propeller guards within the meaning of Section 4302. On the contrary, as we have explained, in 1990 the Coast Guard specifically

[8] In advancing that interpretation, petitioners rely on this Court's decision in *Freightliner*, which held that the absence of a federal regulation served as no preemptive bar to a state common law damages action. The preemption clause in the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA) considered by this Court in *Freightliner*, however, is different from the one at issue here. The NTMVSA preemption clause provided: "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. 1392(d) (1988). The FBSA premption clause, by contrast, provides that, "[u]nless permitted by the Secretary * * *, a State * * * may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. 4306. The Court based its decision in *Freightliner* on the introductory clause of the preemption provision, which required, as a prerequisite for preemption, that a federal regulation be "in effect" for the same aspect of performance. See 514 U.S. at 286. The FBSA's introductory clause is not written in a comparably limiting manner.

declined to institute rulemaking proceedings to require propeller guards. Accordingly, under petitioners' interpretation, the absence of a federal regulation concerning propeller guards is sufficient to save their claims from preemption under Section 4306.

3. The Court need not express an opinion as between those two readings of the express preemption provision. Even under the Coast Guard's longstanding interpretation of the preemption clause as discussed above, petitioners' common law claims are not preempted by Section 4306. That is so because this case does not concern any prescriptive state regulations, and the court of appeals' conclusion that a common law claim is not expressly preempted draws support from the text of Section 4306 itself and from the text and structure of the Act as a whole.

First, a judicial ruling in a tort action is not "a law or regulation establishing a recreational vessel * * * performance or other safety standard or imposing a requirement for associated equipment." As the plurality noted in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), "the presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.* at 522 (opinion of Stevens, J.). Moreover, as we argued in *Freightliner* with respect to similar language, a "standard" "would not ordinarily be thought to include duties of care that derive from the process of common law adjudication." U.S. Amicus Br. at 13 (No. 94-286). For example, a duty of care established in one tort suit with respect to one vessel and its associated propulsion system might or might not translate into a duty of care with respect to a different boat used in different circumstances. The term "standard" in Section 4306, therefore, is best understood to refer to a more definite gauge prescribed in advance by legislative or

administrative authorities. That understanding is further supported by use of the term "standard" in the FBSA to describe the regulations issued by the Secretary, which are prescriptive in nature and do not encompass common law liability. See 46 U.S.C. 4302. See also *Webster's Third New International Dictionary* 2223 (1986) (defining "standard"; def. 3a: "something that is established by authority, custom, or general consent as a model or example to be followed"; def. 7b: "carefully drawn specifications covering manufacturing material or equipment").[9]

Second, a court in a common law damages action would not normally be thought of as a "State or political subdivision of a State" within the meaning of Section 4306. Properly read, the preemption clause requires executive officers of the State or political subdivision to apply to the Secretary for permission to "establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other

[9] The reference to "requirement" in the preemption clause does not change the analysis in the text. Although this Court in *Cipollone* found preemption of common law claims in a statute that used the word "requirements," the statutory language there was much broader. In that case the statute preempted "requirement[s] or prohibition[s] . . . imposed under State law." 505 U.S. at 520. While "state law" is broad enough to encompass state common law applied in tort actions, Section 4306 refers to "*a* law or regulation * * * *imposing* a requirement" (emphasis added), which is more naturally read to refer only to state positive law imposing prescriptive requirements that are similar to the "standards" that are also mentioned in Section 4302. Furthermore, the "requirement" in *Cipollone* involved "obligations 'with respect to the advertising or promotion' of cigarettes," *ibid.*, a more general and sweeping set of conditions on tobacco companies than a finding of liability would be with respect to a particular boat equipped with a particular propeller-driven propulsion system. Another distinction between the FBSA and the statutes at issue in *Cipollone* and *Medtronic* is that those statutes did not contain savings clauses expressly preserving common law claims.

safety standard." Absent much clearer textual language, it would be anomalous to compel state judicial officers to apply to the Secretary for authority to continue a damages action premised on a negligent design theory of liability. Extensive case law exists on a variety of theories alleging the negligent design of a boat. Except in cases involving propeller guards, the notion that federal standards (or the absence of standards, as the case may be) preempt common law design defect claims appears not to have been contemplated by courts and litigants.[10] The experience with

[10] See, *e.g.*, *Detroit Marine Eng'g* v. *McRee*, 510 So. 2d 462 (Miss. 1987) (negligent design in boat steering device); *Rose* v. *Mercury Marine*, 483 So. 2d 1351 (Miss. 1986) (defective design of motor and boat states cause of action); *Young* v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) (assessing whether manufacturer's failure to install kill switch constituted defect); *Becker* v. *U.S. Marine Co.*, 943 P.2d 700 (Wash. App. 1997) (defective design of seating area in bow); *Dubecky* v. *S2 Yachts, Inc.*, 651 N.Y.S.2d 602 (App. Div. 1996) (defective design of cut-out transom and motor well of fishing boat); *Van Berkum* v. *Christian*, 530 N.E.2d 52 (Ill. App. 1988) (design defect claim of gear-shifting mechanism).

Prior to the Coast Guard's decision in 1990 not to promulgate a regulation concerning propeller guards, the idea that the absence of a federal standard on propeller guards might preempt state common law damages claims appears not to have been argued by litigants. See *Degen* v. *Bayman*, 241 N.W.2d 703 (S.D. 1976) (affirming award for plaintiff in propeller injury case). After the 1990 decision, boat manufacturers were sporadic in claiming preemption, although when they did, they typically prevailed with that argument. See, *e.g.*, *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997) (finding preemption of claim predicated on failure to install propeller guard); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991) (preemption not discussed, but manufacturer prevailed on holding that failure to provide propeller guard fails to state cognizable claim); *Fitzpatrick* v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) (considering but rejecting claim of defective design in failure to install propeller guard); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) (finding

"kill switches" is instructive in showing the distinction between the ways the Coast Guard has viewed its power to preempt state positive law versus common law when it has not promulgated a regulation. Although the Coast Guard has exchanged correspondence with state officials to discourage the promulgation of a prescriptive state rule requiring kill switches on motorboats, it has not taken the position that common law claims predicated on a failure by manufacturers to install such devices are preempted by federal law.[11]

Third, 46 U.S.C. 4302(a) provides that the "Secretary may prescribe regulations establishing *minimum* safety standards" (emphasis added). The rationale for "specifying that performance rather than design requirements be adopted is to encourage manufacturers to compete freely in developing and selecting means of meeting or surpassing the performance standards." S. Rep. No. 248, *supra*, at 17. In view of the preemption clause voiding state rules and regulations that are not "identical" to federal stan-

---

preemption of state common law claims under FBSA); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) (same).

[11] A kill switch is a device that stops the throttle when the operator of the boat is thrown overboard. In 1979, the State of Alabama requested an exemption from the Coast Guard in order to impose a state regulation requiring a kill switch. In correspondence with the State, the Coast Guard explained that that request necessitated publication and opportunity for comment in the *Federal Register*. Alabama subsequently withdrew its request for an exemption. (That correspondence has been lodged with the Clerk and served upon counsel for the parties.) Contemporaneously with Alabama's request, there was litigation concerning kill switches in several state courts. See, *e.g.*, *Boatland of Houston, Inc.* v. *Bailey*, 609 S.W.2d 743 (Tex. 1980) (considering claim of defective design in failure to install kill switch but holding that evidence was sufficient to warrant verdict for defendant seller); *Young* v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) (holding that manufacturer's failure to install kill switch in boat did not constitute design defect).

dards, as well as the savings clause preserving state common law claims (discussed below), it is reasonable to infer that Congress intended the federal requirements to be a floor with respect to safety measures that manufacturers must adopt. In certain circumstances, tort liability may provide incentives for manufacturers to provide a higher standard of care than the "minimum safety standard" mandated by the Secretary in federal regulations.

Fourth, the preemptive scope of Section 4306 must be construed in light of the savings clause contained in 46 U.S.C. 4311(g), which provides: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." As explained above, the words used in Section 4306, standing alone, do not appear to preempt common law actions. In addition, Congress's explicit recognition of "common law" claims in Section 4311(g)—and its omission of that phrase in Section 4306—further supports a reading of "law or regulation" in Section 4306 as not encompassing common law claims. See, *e.g.*, *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'") (quoting *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)).

Not only does the language of Section 4311(g) aid in the construction of Section 4306, but the savings clause also makes clear Congress's explicit intent to preserve tort liability. The Senate Report states that the savings clause was enacted "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. Rep. No. 248, *supra*, at

31-32.[12] A fortiori, where, as here, the Coast Guard has chosen not to promulgate a safety standard governing the relevant aspect of performance, the FBSA does not furnish "a complete defense to liability."

Nor does a reading of Sections 4306 and 4311(g) that permits common law claims in these circumstances undermine any purposes of the Act. The regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions. See *English*, 496 U.S. at 85 (common law claims "neither direct nor substantial enough" to be within the preempted field); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 186 (1988) (noting that Congress may find the "incidental regulatory pressure" of state common law claims acceptable even if it concludes that direct state regulatory action is not); see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("Congress intended * * * to tolerate whatever

---

[12] The addition of the savings clause was a "Committee amendment" to the original bill. S. Rep. No. 248, *supra*, at 31. The language of the enacted savings provision closely tracks concerns expressed by Richard Schwartz, Executive Director, Boat Owners Association of the United States, who testified that:

> [W]e would recommend a savings provision with respect to the consumers' private remedies, which is not touched upon by the present Bill. We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits. It should be made clear that this Act does not preempt state or common law. In addition, we would further state that the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition.

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 88 (1971).

tension there was between [federal regulation and state common law claims, and] [w]e can do no less.").[13]

Any decision by manufacturers to respond to state tort liability for propeller-related injuries by placing a propeller guard on a boat will depend on a cost-benefit analysis of the risks associated with incurring liability in a personal injury case versus the costs and risks of putting propeller guards on boats.[14] With respect to certain models of boats used for particular purposes, such a weighing by the manufacturer may lead to the conclusion that the risks of incurring liability warrant no action. With respect to other products, the manufacturer may conclude that the risks justify a range of alternatives, including giving a prospective boat owner the option of installing a propeller guard, making that device a standard feature, or discontinuing propeller-driven propulsion systems altogether for certain types of boats.[15] Propeller-

---

[13] In other circumstances, Congress has expressly ousted state common law claims where it has intended that result. See, *e.g.*, 17 U.S.C. 301(a) (preempting rights "under the common law or statutes of any State"); 29 U.S.C. 1144(c)(1) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law").

[14] See, *e.g.*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357, 358-359 (1984) (social utility of imposing regulations versus allowing tort liability to proceed "is assumed to equal the benefits parties derive from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control"); *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (liability itself stems from a weighing of the probability of injury, the severity of injury, and "the burden of adequate precautions").

[15] As the record in this case makes clear, the Propeller Guard Subcommittee ascertained that "there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries

strike injuries have involved a range of different boat types, from houseboats to miniboat racers.[16] Thus, a decision by a manufacturer to respond to a lawsuit charging negligence in the design of particular boats for particular uses stands in stark contrast to state prescriptive regulations that attempt to create uniformity in the manufacture of all propeller-driven vessels, or even with regard to all products within a certain sub-class of vessels.

4. The court of appeals held that the preemption provision of the FBSA does not preempt a state common law tort claim for defective product design because the savings provision of Section 4311(g) required it to "construe the Act's preemption clause narrowly." Pet. App. A14. The court observed that "[t]he preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading." *Ibid.* Yet in declining to construe the savings clause affirmatively to allow petitioners' claims to proceed, the court functionally read the express preemption clause and the express savings clause to cancel each other out, and chose to resolve this case on implied preemption grounds, based on a supposedly overriding policy of uniformity not expressly

---

or fatalities." J.A. 136-137. A range of different propeller guards have been patented, however, and alternative propulsion systems such as water jet propulsion (the method used in jet skis) may provide suitable alternatives to certain types of existing propeller-driven boats. See J.A. 202-209.

[16] See, *e.g.*, 60 Fed. Reg. 25,191 (1995) (houseboat); *Seymour* v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) (165-horsepower MerCruiser on 19-foot Glastron boat); *Calabro* v. *Outboard Marine Corp.*, 599 So. 2d 717 (Fla. Ct. App. 1992) (miniboat); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) (bass fishing boat); *Beech*, 584 So. 2d at 447 (85-horsepower Johnson boat engine); *Degen*, 241 N.W.2d at 705 (210-horsepower Outboard Marine engine).

mandated by the text of the Act. Our reading of the express preemption and savings provisions, by contrast, gives effect to both: it ensures that state positive rules or regulations are preempted, while saving common law liability claims. There is no indication in the text or legislative history of the savings clause that Congress intended to preserve only certain common law claims, as the court of appeals held. See *id.* at A21-A23. And it would be illogical to suppose that, while Congress was explicitly preserving common law claims based on a failure of persons to comply with federal standards, it intended *not* to save such claims when no standard at all was in effect.

B. The Coast Guard's Decision Not To Regulate Propeller Guards Does Not Impliedly Preempt State Common Law Tort Claims Alleging That The Manufacturer Should Have Installed A Propeller Guard

1. This Court has noted that a finding of "implied conflict pre-emption [is appropriate] where it is 'impossible for a private party to comply with both state and federal requirements,' * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner*, 514 U.S. at 287 (quoting *English*, 496 U.S. at 79, and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards is not a basis for implied conflict preemption of petitioners' common law tort claims.[17]

---

[17] Respondent overstates what the Coast Guard decided with respect to propeller guards. The Coast Guard has never formally determined that "a requirement [of propeller guards] would be contrary to the interests of boat safety." Br. in Opp. I (statement of question presented); see also *id.* at 15 ("The Coast Guard determined * * * that propeller guards should not be required because it would make

It would not be impossible for respondent to comply with both state and federal law: there is simply no federal standard with which a private party must comply. Nothing in the FBSA or in the Coast Guard's regulations currently regulates the use of propeller guards. Because the Coast Guard has imposed no standard either mandating or prohibiting propeller guards, motorboat manufacturers are free to install propeller guards or to pay any common law judgments resting on the premise that it was negligent for the manufacturer not to have installed such a device. In this respect, the agency's decision not to promulgate a regulation because the available data did not support one is indistinguishable from *Freightliner*, where a court of appeals had held that the evidence was insufficient to justify the regulation promulgated by the agency. See 514 U.S. at 286-287.[18]

Nor does petitioners' lawsuit frustrate "the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Petitioners' common law claims do not hinder in any way the ability of the

---

boating *less* safe."). If it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards." J.A. 163. The Coast Guard's acceptance of the Advisory Council's recommendation does not necessarily constitute an endorsement of all of the information gathered by the Propeller Guard Subcommittee. The subsequent requests by the Coast Guard for public comment on various proposals regarding propeller guards and alternative means of reducing the number of propeller strike deaths and injuries are fully consistent with its conclusion in 1990 that the data at that time did not warrant imposition of a mandatory requirement for propeller guards on all propeller-driven motorboats. See pages 7-8, *supra*.

[18] In *Freightliner*, we filed a brief as *amicus curiae* arguing that a state common law tort action was neither expressly nor impliedly preempted in similar circumstances. See U.S. Br. (No. 94-286).

Coast Guard to promulgate federal regulations regarding propeller guards, should the appropriate justifications for such action be present. See *Freightliner*, 514 U.S. at 289. Under our reading of the savings clause, a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule. See *CSX Transp.*, 507 U.S. at 676.

2. In holding that petitioners' claims were impliedly preempted (Pet. App. A15-A25), the court below erred. The court misread the FBSA to give the Coast Guard "exclusive authority to issue safety standards." *Id.* at A18; see also *id.* at A20. As we have explained, the congressional intent to achieve uniformity was not so absolute as to leave no room for common law actions. From that erroneous premise, the court then selectively distilled language from this Court's opinions for the proposition that, when an agency has primacy in a particular regulated field, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Id.* at A16 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). This Court, however, has not often found those circumstances to exist. In *Arkansas Electric Cooperative* itself, for example, this Court ultimately held that "nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion" that a decision not to issue federal regulations should preempt state regulation. 461 U.S. at 384. And although the court below acknowledged (Pet. App. A16) that "a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988),"

it overlooked a crucial point made by this Court in that case:

> *Transcontinental* [*Gas Pipe Line Corp.* v. *State Oil and Gas Bd. of Miss.*, 474 U.S. 409 (1986)] was not meant to announce a new rule of burden-shifting whenever the Federal Government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to pre-empt with a need to find a federal intent to retransfer authority to the States. To the contrary, a "clear and manifest purpose" of pre-emption is always required.

485 U.S. at 503. Thus, *Arkansas Electric Cooperative*, *Puerto Rico Department of Consumer Affairs*, *Freightliner*, and *Medtronic* all support our view that, as in this case, the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety.

A different result is not suggested by this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).[19]

---

[19] The cases on which this Court relied in *Ray* were in areas of well-established federal law concern. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (state intellectual-property action held preempted notwithstanding the absence of an explicit federal regulation in the field because the Court's "past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws"); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774-775 (1947) (failure of National Labor Relations Board to entertain certain actions was actually a determination by the Board "and an exercise of its discretion to determine that [foremen's bargaining units] were not appropriate for bargaining purposes"); *Hines*, 312 U.S. at 66-67 (holding preempted state laws that imposed obligations on aliens because the federal government had enacted a "complete scheme of regulation" and "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations"); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926) (holding state positive law preempted because it purported to impose rule in regulatory field already occupied by federal statute, even though the agency "has not seen fit to exercise its authority to the full extent conferred").

That case also involved the Coast Guard, but it concerned a statutory scheme that is quite distinctive from the one at issue here. As the Court explained in *Ray*, the Ports and Waterways Safety Act of 1972 (PWSA) *required* the Secretary to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Id.* at 161. By contrast, the FBSA takes a different approach: it does not require the Secretary to issue regulations, but rather merely permits him to. Moreover, the FBSA does not address design features of covered vessels in the comprehensive manner addressed in the PWSA. Compare 46 U.S.C. 4302(a) (Secretary "may prescribe regulations establishing minimum safety standards" and "requiring the installation, carrying, or use of associated equipment * * * on recreational vessels subject to this chapter") with 46 U.S.C. 3703(a) ("The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies.") (recodification of 46 U.S.C. 391a(3) (1976), which the Court construed in *Ray*). In addition, the rule at issue in *Ray* was a state prescriptive rule rather than a common law cause of action. That distinction is equally important here, because the FBSA contains a savings clause, but the PWSA, at issue in *Ray*, did not. Pub. L. No. 92-340, 86 Stat. 424.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys

DECEMBER 1997

Supreme Court, U.S.
FILED
DEC 24 1997
CLERK

No. 97-288

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

VICKY LEWIS and GARY LEWIS, Individually, As Parents, as Next Friends, and as Administrators of the Estate of Kathryn C. Lewis,
Petitioners,
v.
BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

QUESTION PRESENTED

Amici will address the following question:

Whether an agency position set forth in a letter and not promulgated pursuant to the notice and comment procedures of APA § 553 has the force and effect of law so as to preempt state law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
A. The Federal Boat Safety Act and Promulgation of Federal Boat Safety Regulations	3
B. The Coast Guard's Decision To Accept the Recommendation of the National Boating Safety Advisory Council To "Take No Regulatory Action To Require Propeller Guards"	6
SUMMARY OF ARGUMENT	8
ARGUMENT	10
THE COAST GUARD'S "POSITION" ON PROPELLER GUARDS DOES NOT HAVE THE FORCE AND EFFECT OF LAW AND CANNOT PREEMPT STATE LAW	10
A. Federal Regulations That Are "Properly Adopted in Accordance With Statutory Authorization" Have the Force and Effect of Law and Can Preempt State Law Under the Supremacy Clause	11
B. The Coast Guard Did Not Intend for Its Letter To Have the Force and Effect of Law Because It Did Not Comply With the Procedural Requirements Imposed by Congress in the APA	14
1. Legislative Rules That Have the Force and Effect of Law Must Be Promulgated Through Notice and Comment Procedures	14

TABLE OF CONTENTS—Continued

Page

2. A Decision Not To Regulate, Like a Decision To Regulate, Requires the Use of Legislative Rulemaking Procedures If It Is To Have the Force and Effect of Law.. 17

C. The Coast Guard Did Not Comply With the Rulemaking Procedures Imposed by Congress in the Federal Boat Safety Act for Prescribing Regulations That Preempt State Law 21

D. The Coast Guard Letter Adopting the National Boating Safety Advisory Council's Recommendation Does Not Preempt State Law Because It Does Not Have the Binding Force and Effect of Law 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases Page

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 19
Batterton v. Francis, 432 U.S. 416 (1977) 14
Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980) 15, 16
Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994) 23
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) 20
Chrysler Corp. v. Brown, 441 U.S. 281 (1979) .....*passim*
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 10
City of New York v. FCC, 486 U.S. 57 (1988) 12, 13
Consumer Federation v. Consumer Product Safety Commission, 990 F.2d 1298 (D.C. Cir. 1993) 18-19
Fidelity Federal Savings and Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 12
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 12
Hillsborough County, Fla. v. Automated Med. Labs, Inc., 471 U.S. 707 (1985) 2, 12
Lincoln v. Vigil, 508 U.S. 182 (1993) 9, 14, 15
Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 22
Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) 19
Morton v. Ruiz, 415 U.S. 199 (1974) 15, 17
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 13
New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 10, 11, 24
Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Development Comm'n, 461 U.S. 190 (1983) 12
Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 19
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 24
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 12

TABLE OF AUTHORITIES—Continued

	Page
State of Alaska v. U.S. Dept. of Transp., 868 F.2d 441 (D.C. Cir. 1989)	17
Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986)	23
Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409 (1986)	20
United Constr. Workers v. Laburnam Constr. Corp., 347 U.S. 656 (1954)	12
Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin., 903 F.2d 445 (7th Cir. 1990)	23
Constitutional Provisions	
U.S. Const., art. VI, cl. 2	11-12
Statutes and Regulations	
1 C.F.R. § 8.1(a)	6
33 C.F.R. Pt. 183	5, 10, 18
33 C.F.R. § 183.701	5
49 C.F.R. § 1.46(n)(1)	5
Pub. L. No. 92-75, 85 Stat. 213 (1971)	3
Pub. L. No. 98-89, 97 Stat. 500 (1983)	3
5 U.S.C. § 552(a)(1)(D)	5
5 U.S.C. § 553	*passim*
5 U.S.C. § 553(b)	14
5 U.S.C. § 553(d)	5
5 U.S.C. § 704	18, 22
5 U.S.C. § 706	18, 22
44 U.S.C. § 1510	6
46 U.S.C. § 4302(a)(1)	3-4
46 U.S.C. § 4302(c)	4
46 U.S.C. § 4306	6, 10
46 U.S.C. § 4611(g)	6
46 U.S.C. § 13110	4
Other Authorities	
H.R. Rep. No. 338, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S.C.C.A.N. 924	3

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333	*passim*
45 Fed. Reg. 18987 (1980)	5, 22
46 Fed. Reg. 3515 (1981)	5, 22
Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like —Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L. J. 1311 (1992)	14, 15, 16, 21
Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994)	*passim*
Ronald M. Levin, *Understanding Unreviewability In Administrative Law*, 74 Minn. L. Rev. 689 (1990)	19
Bernard Schwartz, *Administrative Law* (1991)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-288

VICKY LEWIS and GARY LEWIS, Individually, As Parents, as Next Friends, and as Administrators of the Estate of Kathryn C. Lewis,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE* [1]

Amici, organizations whose members include state, county, and municipal governments and officials

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been

throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interests: whether federal agency positions arrived at by means falling short of notice and comment rulemaking under § 553 of the Administrative Procedure Act have the force and effect of law so as to preempt state law.

The protection of their citizens' health, safety and welfare is one of the principal exercises by the States of their historic police powers. *See Hillsborough County, Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 719 (1985). While the Supremacy Clause unquestionably mandates the preemption of state law in certain circumstances, the Supremacy Clause does not contemplate that federal agency positions not arrived at through the notice and comment procedures of the APA—with their guarantees of public participation, political accountability, and judicial review—be given state law displacing weight by the courts. For this reason, the court of appeals erred in holding that the Coast Guard's position on propeller guards, set forth in a letter that was not promulgated through APA § 553 procedures, has the force and effect of law sufficient to preempt state tort law.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

---

filed with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

A. The Federal Boat Safety Act and Promulgation of Federal Boat Safety Regulations

Congress enacted the Federal Boat Safety Act (FBSA) of 1971, Pub. L. No. 92-75, 85 Stat. 213 (1971), to establish "a coordinated national boating safety program involving both the Federal Government and the States." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 ("Senate Report"). Congress intended, among other goals, "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating." *Id.* at 1333.

Congress revised and recodified the FBSA in 1983 as part of a comprehensive revision and recodification of the maritime laws. Pub. L. No. 98-89, 97 Stat. 500, (1983); *see* H.R. Rep. No. 338, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S.C.C.A.N. 924 ("House Report"). It restated the provisions of the FBSA that apply to "the establishment of national construction and performance standards for recreational vessels and their associated equipment" in Chapter 43 of Title 46 of the United States Code. House Report at 158, 1983 U.S.C.C.A.N. at 970. Although Congress made some substantive changes when it revised the maritime laws, it did not significantly alter the provisions of the FBSA at issue in this case. *See* House Report at 117, 120, 158-62, 1983 U.S.C.C.A.N. at 929, 932, 970-74.

The FBSA authorizes the Secretary of Transportation to "prescribe regulations . . . establishing mini-

mum safety standards for recreational vessels and associated equipment." 46 U.S.C. § 4302(a)(1). The FBSA also provides that "[i]n prescribing regulations the Secretary shall, among other things . . . consult with the National Boating Safety Advisory Council [NBSAC]" about three specific regulatory considerations.[2] *Id.* § 4302(c)(4); *see id.* § 4302 (c)(1)-(3).

Congress intended that the regulations prescribed by the Secretary would establish uniform national safety standards. *See* Senate Report, 1971 U.S.C.C.A.N. at 1335. Congress also intended that the Secretary would employ the notice and comment rulemaking procedures of the Administrative Procedure Act (APA) to promulgate regulations establishing national standards, that these regulations would be subject to judicial review as provided in the APA, and that consultation with the National Boating Safety Advisory Council would be an addition to, and not an alternative to, compliance with the APA.

The Senate Report on the FBSA expressly notes that:

> In addition to the specific procedural requirements outlined in the bill, the Secretary, in promulgating standards, is required to comply with the informal rulemaking procedures of the Administrative Procedure Act (5 U.S.C. 553).

Senate Report, 1971 U.S.C.C.A.N. at 1340. Congress further intended that "[a]ny person who believes

[2] As currently organized, the NBSAC has twenty-one members, including seven state officials, seven representatives of boating manufacturers, and seven representatives of national recreational boating associations and the general public. *See* 46 U.S.C. § 13110.

himself to be adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." *Id.* Congress also noted some specific responsibilities of the Secretary in adopting regulations under the informal notice and comment procedures of the APA:

> The Secretary is expected to maintain in public files the information and comments received or relied upon in carrying out the consideration and consultation [with the National Boating Safety Advisory Council] required by section 6 [now 46 U.S.C. § 4302] and in complying with the rulemaking provisions of the Administrative Procedure Act. The information in these files is to serve as the basis for the required findings as to reasonableness, meeting the need for boating safety and, where applicable, of the necessity for an early effective date, or the necessity for the alteration of existing vessels.

Id.

The Secretary of Transportation has delegated his rulemaking power under the FBSA to the Commandant of the Coast Guard, 49 C.F.R. § 1.46(n)(1), and the Coast Guard has prescribed extensive safety regulations governing recreational boats and associated equipment. 33 C.F.R. Pt. 183 (1997). The Coast Guard, as Congress intended, adopted these regulations pursuant to the notice and comment rulemaking procedures of the APA, 5 U.S.C. § 553. *See* 33 C.F.R. § 183.701 *et seq.* (Subpart L—Start-In Gear Protection) (1997); 46 Fed. Reg. 3515 (1981) (Final Rule); 45 Fed. Reg. 18987 (1980) (Notice of Proposed Rulemaking). The Coast Guard published these regulations in the Federal Register as required by the APA, 5 U.S.C. § 552(a)(1)(D), § 553(d), and it codified them in the Code of Federal Regula-

tions, which "contain[s] each Federal regulation of general applicability and legal effect." 1 C.F.R. § 8.1(a) (1997); *see also* 44 U.S.C. § 1510.

The FBSA expressly preempts a state law or regulation that is not identical to a "regulation prescribed" thereunder. Congress provided that:

> [A] State . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 . . . .

46 U.S.C. § 4306. Congress also enacted a savings clause in the FBSA and provided that:

> Compliance with [the FBSA] or standards, regulations, or orders prescribed under [the FBSA] does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

B. The Coast Guard's Decision To Accept the Recommendation of the National Boating Safety Advisory Council To "Take No Regulatory Action To Require Propeller Guards"

The Coast Guard did not initiate a notice and comment rulemaking under the APA to "consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and to examine the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *See* National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee, J.A. at 46. Instead, the Coast Guard assigned this responsibility to the NBSAC, which in turn appointed

a five-person subcommittee to address these issues. *Id.* The subcommittee recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 73. Subsequently, the NBSAC voted unanimously "to accept the report [and to] adopt the recommendations of the subcommittee." Minutes of the 44th Meeting of the National Boating Safety Advisory Council, J.A. at 138.

On February 1, 1990, the Chief of the Coast Guard's Office of Navigation Safety and Waterway Services, Rear Admiral Robert T. Nelson, wrote a letter to A. Newell Garden, Chairman of the NBSAC. Admiral Nelson reported that "[w]e have completed our review of the 'Report of the Propeller Guard Subcommittee' " and that "[a]ll of the report's recommendations are accepted." J.A. at 163. Admiral Nelson specifically accepted the subcommittee's recommendation as approved by the NBSAC that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* He set forth as follows the Coast Guard position on this recommendation:

> Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Id. Admiral Nelson stated, however, that "the Coast Guard will continue to collect and analyze data for changes and trends" and "review and retain any information made available regarding development

and testing of new propeller guard devices or other information on the state of the art." *Id.* The Coast Guard did not publish Admiral Nelson's letter in the Federal Register.

The district court granted Brunswick's motion for summary judgment. The court of appeals affirmed, holding that common law claims based on Brunswick's failure to equip an engine with a propeller guard are impliedly preempted because those claims "conflict with the Coast Guard's position that propeller guards should not be required." Pet. App. 23a. The court of appeals held that the Coast Guard's "position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed," and "[t]hat position impliedly preempts state law requirements of propeller guards, even in the form of common law claims." *Id.* at 24a.

SUMMARY OF ARGUMENT

Brunswick's claim that the Coast Guard's position on propeller guards preempts state tort law founders on the shoals of a fatal defect: the Coast Guard did not employ the notice and comment rulemaking procedures required by Congress in the Administrative Procedure Act and the Federal Boat Safety Act that are necessary to give its position the force and effect of law.

The court of appeals' holding—that an agency's position in a letter adopting the recommendations of an advisory committee preempts state law—is inconsistent with this Court's recognition that only "properly promulgated, substantive agency regulations have the 'force and effect of law' " necessary "to pre-empt state law under the Supremacy Clause." *Chrysler*

Corp. v. Brown, 441 U.S. 281, 295-96 (1979) (citations omitted). As applied by the court of appeals to preempt the Lewises' tort claims against Brunswick, the Coast Guard's "position" on propeller guards is in effect a "substantive rule or 'legislative-type rule' " because it " 'affect[s] individual rights and obligations.' " *Id.* at 302 (citations omitted). A "substantive rule," however, "must conform with any procedural requirements imposed by Congress" in order to have the force and effect of law. *Id.* at 303. Congress requires agencies to develop "legislative rules"—rules that have the same binding effect as statutes—through the public notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. *Chrysler v. Brown*, 441 U.S. at 312-16.

The Coast Guard did not comply with the APA's rulemaking procedures: it did not publish notice of a proposed rulemaking in the Federal Register, afford interested persons an opportunity to comment on the letter, or publish a final rule incorporating " 'a concise general statement' " of the rule's " 'basis and purpose.' " *See Lincoln v. Vigil*, 508 U.S. 182, 195-96 (1993) (quoting 5 U.S.C. § 553). The Coast Guard's failure to comply strictly with the APA "precludes courts from affording [the letter] the force and effect of law." *Chrysler v. Brown*, 441 U.S. at 312. Because the Coast Guard letter plainly does not have the force and effect of law, it cannot preempt state law. Respect for the role of the States in the federal system and for the principle of politically accountable agency decisionmaking are further reasons to reaffirm the fundamental requirement that an agency cannot promulgate a rule with the force and effect of law necessary to preempt state law unless it complies with the

notice and comment rulemaking procedures of the APA.

ARGUMENT

THE COAST GUARD'S "POSITION" ON PROPELLER GUARDS DOES NOT HAVE THE FORCE AND EFFECT OF LAW AND CANNOT PREEMPT STATE LAW

The determination whether federal law preempts state law is a question of congressional purpose. *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The FBSA, by its terms, preempts only a state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 [of the Act]." 46 U.S.C. § 4306.

In this case, there is no regulation prescribed under section 4302 that has the force and effect of law necessary to trigger preemption. Unlike the numerous instances in which the Coast Guard intended to preempt state law, *see* 33 C.F.R. Part 183, in this case the Coast Guard did not comply with the procedural requirements imposed by Congress in APA § 553. It did not observe the notice and comment procedures mandated by the APA and by the FBSA and its letter was not judicially reviewable. Consequently, the Coast Guard letter cannot be given preemptive effect.[3]

[3] Brunswick suggests that preemption under the express preemption clause of the FBSA, section 4306, does not turn on a "regulation prescribed under section 4302," and that, instead, section 4306 should be "read literally," and apparently without any regard to congressional intent, to provide that "state law is preempted unless it is 'identical to a regulation prescribed by the Coast Guard.'" Opp. 21 n.15. As Brunswick parses the text of section 4306, all state law, including tort law, is preempted by section 4306, and state law is restored only if (1) the Coast Guard prescribes a regulation under section 4302 and (2) state law is then identical to the newly minted federal regulation.

This construction of section 4306 ignores this Court's recent unanimous restatement of the framework for analysis of express preemption provisions. *Travelers Ins. Co.*, 514 U.S. at 654-55. If a statute, like the FBSA, contains an express preemption provision, resolution of preemption issues "begin[s] . . . with the text of the provision in question." *Id.* at 655. Nonetheless, because "pre-emption claims turn on Congress's intent," the Court "move[s] on, as need be, to the structure and purpose of the Act." *Id.* Moreover, this Court addresses an express preemption provision, like other claims of preemption, "with the starting presumption that Congress does not intend to supplant state law." *Id.* at 654.

Brunswick's construction of section 4306 is inconsistent with these principles. Congress enacted the FBSA to improve boating safety. Senate Report, 1971 U.S.C.C.A.N. at 1333. Under Brunswick's reading of section 4306, Congress preempted all state law with respect to recreational vessels and completely freed manufacturers of their duties of care under state tort law even in the absence of any applicable federal safety standard. Brunswick would read the FBSA to create a common law and regulatory void with respect to manufacturing safe recreational vessels and boating equipment until such time, if ever, that the Coast Guard, with limited

A. Federal Regulations That Are "Properly Adopted in Accordance With Statutory Authorization" Have the Force and Effect of Law and Can Preempt State Law Under the Supremacy Clause

The Supremacy Clause of the Constitution provides for preemption of state law by stating that "the

Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824); *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Federal regulations, as well as federal statutes, can preempt state law. *See, e.g., Hillsborough County, Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982).

---

resources and numerous responsibilities, decides to prescribe a federal safety standard. This void would obviously be inconsistent with Congress' purpose of improving boating safety.

Brunswick's analysis of the preemptive effect of section 4306 would also be inconsistent with two well-settled rules: in the absence of a federal regulation, federal statutes should not be construed to create a regulatory void by preempting state regulation, *see Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Development Comm'n*, 461 U.S. 190, 207-08 (1983), and state common law remedies are not preempted where federal law provides no comparable or alternative remedy, *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *United Constr. Workers v. Laburnam Constr. Corp.*, 347 U.S. 656, 663-64 (1954).

Ironically, and somewhat perversely, under Brunswick's reading of section 4306, the States cannot enforce traditional common law duties of care where there is no federal safety standard to protect consumers; the States can only act to protect consumers after the Coast Guard has acted to protect them by prescribing a federal safety standard. Brunswick in effect reads the express preemption clause of the FBSA as if it is a prospective savings clause: all state law is preempted, subject to reinstatement if the Coast Guard issues a regulation and if it is identical to the federal regulation. Of course, the FBSA contains a savings clause, section 4311(g), and Brunswick's construction of the express preemption clause would, contrary to settled principles of statutory construction, reduce the savings clause to mere surplusage.

If they are to have the same preemptive effect as federal statutes, federal regulations must be "properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. at 63 (the Supremacy Clause embraces "both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization"). Such federal regulations can preempt state law because, like federal statutes, they have the "force and effect of law." *Chrysler v. Brown*, 441 U.S. at 295. *See id.* at 295-96.

In order "to have the 'force and effect of law,'" a federal regulation "must have certain substantive characteristics and be the product of certain procedural requisites." *Id.* at 301 (citation omitted). As a substantive matter, a regulation does not have the "force and effect of law" unless the agency has acted within its statutory authority: "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* at 302. As a procedural matter, a regulation does not have the "force and effect of law" unless it "conform[s] with any procedural requirements imposed by Congress." *Id.* at 303. "[A]gency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

The Coast Guard letter adopting the recommendation of the National Boating Safety Advisory Council

is not a legislative rule because it did not conform with the procedural requirements imposed by Congress in the APA and the FBSA. Consequently, the Coast Guard letter does not have the force and effect of law and cannot preempt state law under the Supremacy Clause.

B. The Coast Guard Did Not Intend for Its Letter To Have the Force and Effect of Law Because It Did Not Comply With the Procedural Requirements Imposed by Congress in the APA

1. *Legislative Rules That Have the Force and Effect of Law Must Be Promulgated Through Notice and Comment Procedures*

The Administrative Procedure Act distinguishes two types of substantive rules: (1) legislative rules, also referred to as "substantive" rules, and (2) interpretive rules (sometimes called "non-legislative" rules) or general statements of policy. *See Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (distinguishing (1) "so-called 'legislative' or 'substantive' rules" and (2) " 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' ") (*quoting* 5 U.S.C. § 553(b)); *Chrysler v. Brown*, 441 U.S. at 301-02 & n. 31 (distinguishing (1) "a substantive rule—or a 'legislative-type rule' " from (2) "interpretive rules" and "general statements of policy"); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (distinguishing (1) "legislative, or substantive regulations" and (2) "interpretative regulation[s]").[4]

[4] *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311, 1319-27 (1992); Kenneth C. Davis &

A "legislative" or "substantive" rule is one that " 'affect[s] individual rights and obligations.' " *Chrysler v. Brown*, 441 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974)); *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980).[5] Legislative or substantive rules, unlike interpretive rules or general statements of policy, may have the same force and effect of law as statutes. *Chrysler v. Brown*, 441 U.S. at 302 & n. 31; *see* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.2, at 228 (3d ed. 1994) ("a valid legislative rule has the same binding effect as a statute; a general statement of policy has no binding effect on members of the public or on courts").

In order to have the binding effect of a statute, a legislative rule must be promulgated under the notice and comment procedures of the APA. *See Chrysler v. Brown*, 441 U.S. at 312-14 (APA's notice and comment procedures apply "in the context of 'legislative' or 'substantive' rulemaking," but interpretive rules and general statements of policy "are exempt from these requirements"); *see also Lincoln v. Vigil*, 508 U.S. at 196 (APA's notice and comment procedures apply to "legislative" or "substantive" rules). As one leading authority has observed:

Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.2, at 228 (3d ed. 1994) (discussing "three main differences between a legislative rule and a general statement of policy"); *id.* § 6.3, at 233 (discussing "four main differences between legislative rules and interpretative rules").

[5] *See also* Anthony, 41 Duke L.J. at 1355 (defining a legislative rule as one that changes substantive law or policy); *id.* at 1355 n. 269 (collecting cases identifying various classes of substantive changes subject to legislative rulemaking requirements).

> The most important category of rules—legislative rules—have the same binding effect as statutes. With specified exceptions, "rules" of this type can be promulgated only through use of procedures set forth in APA § 553—public notice of the proposed rule, receipt and consideration of comments on the proposed rule, and issuance of the final rule incorporating a statement of basis and purpose.

Davis & Pierce § 6.1, at 225. "The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after government authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d at 703.

The court of appeals erred in holding that the Coast Guard's "position" that it "should take no regulatory action to require propeller guards," Pet. App. 8a-9a, preempts state law. The Coast Guard's position was not adopted under the APA's notice and comment procedures, and it is not a valid legislative rule. The Coast Guard's position is at most a general statement of policy.[6] It does not have the force and effect of law because it was not promulgated under legislative rulemaking procedures and was not subject to judicial review. The Coast Guard's position

---

[6] This Court has defined "general statements of policy" as "'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" *Chrysler v. Brown*, 441 U.S. at 302 n.31 (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); *see* Anthony, 41 Duke L.J. at 1321-27 (distinguishing and defining legislative rules, interpretive rules, and general statements of policy).

thus does not have the force and effect of law necessary to preempt state law. *See State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989) (agency's legislative rules held invalid and of no preemptive effect because agency failed to employ APA notice and comment procedures).

2. *A Decision Not To Regulate, Like a Decision To Regulate, Requires the Use of Legislative Rulemaking Procedures If It Is To Have the Force and Effect of Law*

The Coast Guard's position that it should take no regulatory action to require propeller guards is not excused from compliance with the APA's notice and comment legislative rulemaking procedures on the ground, suggested by Brunswick, that the agency made a negative decision "*not* to regulate" as opposed to an affirmative decision to regulate propeller guards. Opp. 16. Any agency decision concerning propeller guards—whether to require them or to prohibit them—must, if it is to preempt state law creating "individual rights and obligations," *Chrysler v. Brown*, 441 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. at 232), be made under the notice and comment, legislative rulemaking procedures of the APA, 5 U.S.C. § 553. The Coast Guard did not follow these procedures. Its letter is therefore not a "legislative" or "substantive" rule having the force and effect of law necessary to preempt state law under the Supremacy Clause.

An affirmative decision by the Coast Guard to regulate propeller guards would undoubtedly have to be made under the APA's notice and comment rulemaking procedures in order to preempt state law. The Coast Guard apparently recognizes as much, and has

followed the APA's notice and comment rulemaking procedures in prescribing numerous regulations under section 4302 of the FBSA. *See* 33 C.F.R. Pt. 183 (1997). The Coast Guard, for example, would have to follow the APA's notice and comment rulemaking procedures to prescribe a regulation requiring a particular type of propeller guard or setting performance criteria for propeller guards. Such a regulation would affect individual rights and obligations of boat users like Kathryn Lewis and engine manufacturers like Brunswick. It could prevent States from enacting laws or regulations requiring propeller guards that were not identical to the types of guards required by federal law and, under the court of appeals' reading of the FBSA, it could also preclude liability under state tort law. The court of appeals erred in giving similar preemptive effect to the Coast Guard's position that it should take no regulatory action to require propeller guards, because the agency did not follow the procedures required by the APA.

There is, in short, no difference between affirmative and negative regulatory decisions intended by the agency to affect individual rights and obligations. Both must comply with the APA. If the Coast Guard intended its position that it should take no regulatory action to require propeller guards to have the force and effect of law and preempt state law, then it should have conducted a rulemaking proceeding and issued a final rule, subject to judicial review, to that effect. *See* 5 U.S.C. §§ 704, 706; *see also* Senate Report, 1971 U.S.C.C.A.N. at 1340. Agencies frequently conduct rulemaking proceedings, examine a regulatory problem on the merits, and then decide for substantive reasons not to promulgate a regulation. *See, e.g., Consumer Federation v. Consumer Product Safety Comm'n*, 990 F.2d 1298, 1304-08

(D.C. Cir. 1993) (reviewing an agency decision not to regulate and to terminate a rulemaking proceeding); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979) (reviewing an agency's failure to issue a rule after conducting a rulemaking proceeding); *see also* Ronald M. Levin, *Understanding Unreviewability In Administrative Law*, 74 Minn. L. Rev. 689, 769-70 & n. 405 (1990) (noting that this Court has recognized for fifty years the reviewability of "negative orders"—decisions not to regulate made after conducting a rulemaking proceeding). This, however, did not occur here.

Brunswick has offered no authority to support its position that affirmative and negative regulatory decisions that have substantial effects on individual rights and obligations should be subject to different procedural requirements under the APA. *See* Opp. 16. Moreover, the distinction proposed by Brunswick, between decisions not to regulate[7] and decisions to

---

[7] Brunswick also characterizes the Coast Guard's decision not to regulate as a type of "inaction" that "preempts state law." Opp. 19. It is true, as Brunswick notes, that this Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). This principle, however, has only rarely found application. Indeed, this Court refused to find preemption of state law in the two principal "inaction" cases discussed by *Brunswick*. *See* Opp. 19-20 (citing *Arkansas Elec. Coop. Corp.*, 461 U.S. at 384-85, and *Isla Petroleum Corp.*, 485 U.S. at 503-04).

These inaction cases, and others, are best understood as according preemptive effect to a federal decision not to regu-

regulate, would negate public participation in the rulemaking process and preclude judicial review. Congress, however, intended that regulations prescribed

late some matter (X) where most other matters from A to Z are subject to federal regulation. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 422 (1986) (preemption of state regulation of sale of natural gas to an interstate pipeline in context of comprehensive federal statutory regulation of natural gas). "Inaction" may constitute an act of preemption if there is a comprehensive federal regulatory scheme and a federal agency intentionally leaves a gap in the regulated field.

In this case, there is no gap in the Coast Guard's regulation of propeller guards from which a preemptive inference can be drawn. Brunswick's inaction argument would have force if, for example, the Coast Guard announced in a notice of proposed rulemaking its intention to require propeller guards on motor boats ten to thirty feet long and then published a final rule requiring propeller guards on motor boats ten to twenty-five feet long. A preemptive inference could be drawn from the agency's inaction with respect to motor boats twenty-five to thirty feet in length. The inaction cases noted above would support the inference that the Coast Guard did not intend to require propeller guards on this limited group of large motor boats and that state laws and regulations requiring propeller guards on motor boats twenty-five to thirty feet in length were preempted. Nonetheless, as Justice Frankfurter cautioned, courts should be reluctant to draw an inference of preemption from unexercised federal power: "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

under section 4302 of the FBSA be subject to judicial review. *See* Senate Report, 1971 U.S.C.C.A.N. at 1340. If, as Brunswick contends, a decision not to regulate is not subject to the APA's notice and comment procedures, then it would likewise not be subject to judicial review, in contravention of Congress' intent. *See* Anthony, 41 Duke L. J. at 1317-18 n. 25.

The Coast Guard can, of course, have a policy of "tak[ing] no regulatory action to require propeller guards" without observing the APA's notice and comment procedures. If, however, the Coast Guard intends that its position have the binding force and effect of law so as to preempt the rights and obligations of individuals created by state law, then the agency must comply with the legislative rulemaking procedures prescribed by Congress.

C. The Coast Guard Did Not Comply With the Rulemaking Procedures Imposed by Congress in the Federal Boat Safety Act for Prescribing Regulations That Preempt State Law

Congress specifically intended that the Coast Guard observe the notice and comment procedures of the APA in prescribing regulations under the FBSA. *See* Senate Report, 1971 U.S.C.C.A.N. at 1340. Congress also imposed an additional procedural requirement on the Coast Guard: consultation with the National Boating Safety Advisory Council (NBSAC).[8] The Coast Guard, in promulgating regulations, has recog-

[8] Congress can add procedural requirements to the notice and comment procedures prescribed in the APA, and many statutes impose the additional requirement of consultation with an advisory council. Davis & Pierce § 7.7; Bernard Schwartz, *Administrative Law* § 4.10, at 189-90 (1991).

nized that consultation with the NBSAC is an addition to, and not an alternative to, compliance with the APA. For example, when the Coast Guard proposed a rule on start-in gear protection devices, it published in the Federal Register a notice of proposed rulemaking. 45 Fed. Reg. 18987 (1980). This notice reported that the Coast Guard had consulted with the NBSAC and that both the transcript of the NBSAC's discussion of the proposed rule and the minutes of the NBSAC meeting were available for examination. *Id.* The Coast Guard, in compliance with the APA, invited "[i]nterested persons . . . to participate in this proposed rulemaking." *Id.* Moreover, in promulgating its final rule, the Coast Guard responded to significant comments, *see* 46 Fed. Reg. at 3515 (1981), and its final rule was subject to judicial review. *See* 5 U.S.C. §§ 704, 706.

In adopting its position on propeller guards, the Coast Guard did not use the procedures that are necessary to give its position the force and effect of law. The agency did not initiate notice and comment rulemaking under the APA, and its letter was not subject to judicial review. The Coast Guard's position is obviously not the equivalent of a "regulation prescribed under section 4302" of the FBSA. It thus does not preempt state law because the agency did not "conform with [the] procedural requirements imposed by Congress." *Chrysler v. Brown*, 441 U.S. at 303; *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority").

D. The Coast Guard Letter Adopting the National Boating Safety Advisory Council's Recommendation Does Not Preempt State Law Because It Does Not Have the Binding Force and Effect of Law

The Coast Guard did not comply with the notice and comment procedures imposed by Congress in the APA and in the FBSA: its position on propeller guards is not a valid rule under the APA, and it is not a "regulation prescribed under section 4302" of the FBSA. In consequence, the Coast Guard letter adopting the recommendation of the NBSAC does not have the "force and effect of law" because it does not "conform with [the] procedural requirements imposed by Congress." *Chrysler v. Brown*, 441 U.S. at 302-03.

Unlike other courts of appeals, the court below failed to recognize that the Coast Guard letter cannot preempt state law because it does not have the force and effect of law. *See Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 453-54 (7th Cir. 1990) (an agency official's letter does not have the force and effect of law because it was not adopted after notice and comment). *See also Thomas v. New York*, 802 F.2d 1443, 1446-48 (D.C. Cir. 1986) (Scalia, J.) (an administrator's letter is not binding because it was not issued after notice and comment and was not published in the Federal Register), *cert. denied*, 482 U.S. 919 (1987). *Cf. Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994) ("Executive Branch communications that express federal policy but lack the force of law" cannot preempt state law). Judge Easterbrook observed in 1990 that no "case hold[s] that a federal agency may preempt state law without either rulemaking or adjudication." *Wabash Valley Power*, 903 F.2d at 454.

Brunswick suggests that the "extensive fact-finding activities" of the Propeller Guard Subcommittee and the decisions of the NBSAC and the Coast Guard to accept the subcommittee's recommendations are the equivalent of rulemaking under the APA. Opp. 4-7, 16. Consultation with the advisory council, however, is an additional procedural requirement for rulemaking imposed by Congress in the FBSA; it is not a substitute for the APA's notice and comment procedures. More important, this Court has already rejected Brunswick's suggestion and held that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act." *Chrysler v. Brown*, 441 U.S. at 313. Courts cannot excuse the "lack of strict compliance with the APA," *id.* at 312, because this Act "is a formula upon which opposing social and political forces have come to rest." *Id.* at 313. The courts "are charged with maintaining [that] balance [by] ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* (citations omitted).

* * * *

This Court has repeatedly held that the historic police powers of the States are not preempted "unless that was the clear and manifest purpose of Congress." *See, e.g., Travelers*, 514 U.S. at 645 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where Congress has granted federal agencies the weighty power to preempt state law, it is essential that agencies be required to exercise this power in a politically accountable manner. *See* Davis & Pierce § 6.7, at 262 (notice and comment rulemaking enables public to express concerns to President and members of Con-

gress, who, in turn, can "express to the agency their views concerning the proposed policy decision and, through the process of Executive and congressional oversight, . . . affect agency resolutions of policy disputes"). The Court should reaffirm the fundamental rule of law that a federal agency cannot preempt state law unless it complies with the notice and comment rulemaking procedures of the APA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

December 24, 1997

(8)

Supreme Court, U.S.
FILED
MAY 28 1998
CLERK

No. 97-288

In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends, and as administrators of the Estate of Kathryn C. Lewis,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT

Of Counsel:

HUGH F. YOUNG, JR.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, Virginia 22091
(703) 264-5300

MALCOLM E. WHEELER*
PARCEL, MAURO, HULTIN & SPAANSTRA, P.C.
1801 California Street
Suite 3600
Denver, Colorado 80202
(303) 292-6400

Counsel of Record for Product Liability Advisory Council, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE PREEMPTION PROVISION OF THE BOAT SAFETY ACT APPLIES TO STANDARDS AND REQUIREMENTS IMPOSED BY STATE TORT LAW, REGARDLESS OF WHETHER THE STATE TORT LAW IS STATUTORY OR COMMON LAW..... 3

II. 46 U.S.C. SECTION 4311(g) DOES NOT LIMIT THE SCOPE OF THE BOAT SAFETY ACT'S PREEMPTION PROVISION, BUT INSTEAD NEGATES COMPLIANCE WITH FEDERAL REGULATIONS AS AN AFFIRMATIVE DEFENSE 19

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 11

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 20

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 13

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ..*passim*

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 4, 7, 12, 13, 24

Delvaux v. Ford Motor Co., 764 F.2d 469 (7th Cir. 1985) 18

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 5, 8, 14

Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 24

I.N.S. v. National Ctr. for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 20

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)..... 5, 8

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 11

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993)..... 20

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 11

Malone v. White Motor Corp., 435 U.S. 497 (1978), *aff'd*, 444 U.S. 911 (1979)..... 21

TABLE OF AUTHORITIES – Continued

Page(s)

Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996)... 4, 7, 14

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 20

Norfolk & W. Ry. v. American Train Dispatchers Assoc., 499 U.S. 117 (1991) 5, 8

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 21

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 10

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)..... 24

Shenker v. Baltimore & Ohio R.R., 374 U.S. 1 (1963) 11

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 11

United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 11

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990)..... 17

STATUTES, RULES, AND CODES

12 U.S.C. § 1715z-12, -18(e) (1989) 5, 6, 7

15 U.S.C. § 1334(b) 8

15 U.S.C. § 1391 17

15 U.S.C. § 4406(c) 20

17 U.S.C. § 301(a) (1977)..... 5, 6, 7

28 U.S.C. § 1331(a) 8

29 U.S.C. § 301 21

TABLE OF AUTHORITIES – Continued

Page(s)

29 U.S.C. § 1144(b)(2)(A) 20

42 U.S.C. §§ 2000e-7 and 2000h-4 21

46 U.S.C. § 767 21

46 U.S.C. § 4302 ..... 4, 12, 13, 15, 16

46 U.S.C. § 4305 4

46 U.S.C. § 4306 ..... *passim*

46 U.S.C. § 4307 16

46 U.S.C. § 4311(g) ..... *passim*

49 U.S.C. § 1506 20

49 U.S.C. § 30102(a)(9) 17

85 Stat. 217 (1971) 19, 25

85 Stat. 228 (1971) 19, 25

41 Fed. Reg. 3291 (Jan. 16, 1976) 17

Ala. Code §§ 6-5-500 *et seq.* 18

La. Code §§ 2800.52 *et seq.* 18

Tenn. Code Ann. §§ 29-28-101 *et seq.* 18

OTHER AUTHORITIES

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 88 (1971) 23

S. Rep. No. 92-248, 92d Cong., 1st Sess. 32 (1971), *reprinted in* 1972 U.S. Cong. & Admin. News 1333 23

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("the Advisory Council") is a nonprofit corporation with 125 corporate members from a broad cross-section of American industry.[2] It was formed for the principal purpose of submitting *amicus curiae* briefs to assist courts in the sound development of product liability law.

The Advisory Council's members include many manufacturers whose products are regulated under federal laws that seek to promote product safety and consumer welfare by ensuring a certain amount of national uniformity in the design and performance standards those products are required to meet. The briefs submitted by Petitioners and their *amici* include arguments that (a) sweep so broadly as to undermine several of those federal laws, (b) conflict with important principles of preemption and statutory construction, and (c) would, if accepted, impede product safety and harmfully burden the free flow of commerce with improper state law impediments. Accordingly, although it supports Respondent in urging affirmance of the judgment below for the reasons stated in the Brief of Respondent, the Advisory Council's primary interest here is to ensure that certain of

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A list of the members of *Amicus Curiae* Product Liability Advisory Council, Inc. is attached as Appendix A.

the erroneous arguments made by Petitioners and their *amici* do not obstruct the sound development of preemption principles or the proper interpretation and application of preemption provisions in this and other cases.

SUMMARY OF THE ARGUMENT

The preemption provision of the Boat Safety Act by its terms applies when any state seeks to establish or enforce any "law or regulation" establishing a safety standard or imposing a requirement for recreational vessels or associated equipment. That language, both on its face and when interpreted in a manner consistent with the decisions of this Court, applies to all forms of state law, including common-law standards and requirements as well as statutory and regulatory standards and requirements.

The "saving clause" of the Boat Safety Act does not limit the scope of the preemption provision; rather, it negates compliance with federal regulations as an affirmative defense. The language of the saving clause refers only to the effect of "compliance," which is irrelevant to a preemption analysis, and it makes no mention of either preemption or federal supremacy. It also uses language that differs demonstrably from the anti-preemption language commonly employed by Congress in saving clauses that actually are intended to restrict the preemptive scope of federal statutes.

The structure of the Boat Safety Act further shows that the saving clause was not intended broadly to

exempt common-law claims from the preemption provision's coverage. The preemption provision specifies the only exceptions that limit its scope, and the saving clause, which appears in an entirely different part of the Act, is not one of them.

The legislative history of the Act still further confirms that the saving clause was not intended to preclude the preemption of common-law claims that would impede the goal of national uniformity of boat safety standards. Congress considered and rejected an explicit request to add a provision that would have "made it clear that this Act does not preempt state or common law."

ARGUMENT

I. THE PREEMPTION PROVISION OF THE BOAT SAFETY ACT APPLIES TO STANDARDS AND REQUIREMENTS IMPOSED BY STATE TORT LAW, REGARDLESS OF WHETHER THE STATE TORT LAW IS STATUTORY OR COMMON LAW

Petitioners and their *amici* have argued that the Boat Safety Act's preemption provision, section 4306, does not apply to standards and requirements imposed by common law. (*See* Pet. Br. 24-28;[3] TLPJ Br. 17-20;[4] U.S. Br. 17-21.[5]) They are wrong.

---

[3] Citations to "Pet. Br." are to the Brief of Petitioners.

[4] Citations to "TLPJ Br." are to the Brief of *Amicus Curiae* Trial Lawyers for Public Justice, P.C., in Support of Petitioners.

[5] Citations to "U.S. Br." are to the Brief for the United States as *Amicus Curiae* Supporting Petitioners.

As this Court repeatedly has stated, the task of construing a preemption provision "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). *Accord Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996). Here, the "plain wording" of the Boat Safety Act's preemption provision encompasses standards and requirements imposed by *all* state law, which includes common law as well as state statutes and regulations. The statute declares:

> Unless permitted by the Secretary under section 4305 of this title, *a State* or political subdivision of a State *may not establish, continue in effect, or enforce a law* or regulation *establishing* a recreational vessel or associated equipment performance or other *safety standard or imposing a requirement* for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (emphasis added).

The core language identifying the types of state action preempted is "law or regulation establishing a . . . safety standard or imposing a requirement. . . . " Because it says "*law* or regulation," not "*statute* or regulation," it provides no basis for reading "law" to mean only "statute" and to exclude common law. This Court has too often declared that "the phrase 'state law' . . . include[s]

common law as well as statutes and regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992). *See, e.g., Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Erie R.R. v. Tompkins*, 304 U.S. 64, 71, 79 (1938).

Petitioners and their *amici* ignore those decisions, making no attempt to distinguish them. Instead, Petitioners and their *amici* point to other language in the preemption provision, to other provisions of the Boat Safety Act, and to the absence of an explicit reference to "common law" in section 4306 in an effort to show that Congress really meant "statute" when it said "law" in section 4306. The effort is unavailing.

Petitioners and their *amici* first contend that section 4306 does not encompass common law because "the pre-emption clause does not provide that 'common law' actions are pre-empted. Congress has repeatedly shown its ability to expressly refer to 'common law' when it intends to include it within the scope of a pre-emption clause." (Pet. Br. 24-25 (citing Copyright Act of 1976, 17 U.S.C. § 301(a) (1977), and Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989), as preemption provisions containing the term "common law." *Accord* TLPJ Br. 19).) That argument proves both too much and too little.

It proves too much because section 4306 not only omits an explicit reference to "common law," but likewise omits any explicit reference to "statutes" or "legislative enactments." Therefore, if it were correct that a preemption provision applies only to forms of state action that it

narrowly and specifically names, section 4306 would not preempt statutes, either. But Petitioners and their *amici* in fact concede that section 4306 does apply to "legislative . . . actions" or "legislative . . . enactments." (Pet. Br. 25, 27. *Accord* U.S. Br. 18 n.9; TLPJ Br. 19.)

Cipollone further confirms that the use of the phrase "law or regulation," rather than the phrase "statute or regulation," in the Boat Safety Act's preemption provision indicates Congress' intent to preempt something more than positive enactments. The Court stated:

> [W]hile the version of the 1969 Act passed by the Senate pre-empted "any State *statute or regulation* with respect to advertising or promotion . . . , the Conference Committee replaced this language with "State *law* with respect to advertising or promotion." In such a situation, § 5(b)'s pre-emption of "state law" cannot fairly be limited to positive enactments.

Cipollone, 505 U.S. at 523 (emphasis in original). In short, the broader word "law" generally encompasses both statutory law and common law, and Congress can achieve broad preemption by using that encompassing word, rather than having to list the various kinds of laws.

In addition, Petitioners undermine their own argument by pointing to the preemption provisions of the Copyright Act of 1976 and the Domestic Housing and International Recovery and Financial Stability Act ("Domestic Housing Act") to support their contention that Congress "has repeatedly shown its ability to expressly refer to 'common law' when it intends to include it within the scope of a pre-emption clause." (Pet. Br. 24-25.) Both of those preemption provisions explicitly

refer to "statute" or "statutes" as well as to "common law." Thus, the very provisions on which Petitioners rely prove that Congress has shown its ability "to expressly refer" to "statutes" every bit as much as it has shown its ability "to expressly refer" to "common law." If, as Petitioners argue, the omission of an explicit reference to "common law" in the Boat Safety Act's preemption provision were to mean that common-law standards and requirements cannot be preempted, then the omission of an explicit reference to "state statutes" likewise would mean that statutory standards and requirements could not be preempted either. Since Petitioners and their *amici* concede that state statutory standards and requirements can be preempted (*see, e.g.*, Pet. Br. 25, 27; U.S. Br. 18 n.9; TLPJ Br. 19), the Copyright Act and the Domestic Housing Act do not support Petitioners' argument; instead, they further show that the argument proves too much.

Petitioners' argument proves too little because it fails to distinguish, and in fact contradicts, the many cases in which this Court has held that preemption provisions omitting explicit reference to "common law" can nevertheless preempt common-law standards and requirements. *See, e.g., Medtronic*, 116 S. Ct. at 2262, 2263 (O'Connor, J., Rehnquist, C.J., Scalia & Thomas, J.J., concurring in part and dissenting in part) ("requirements" in Medical Device Amendments of 1976 encompasses common law); *id.* at 2259 (Breyer, J., concurring in part and concurring in the judgment) (same); *Easterwood*, 507 U.S. at 664 ("law, rule, regulation, order, or standard" in Federal Railroad Safety Act of 1970 encompasses common law); *Cipollone*, 505 U.S. at 522 ("requirement or prohibition" in Public Health Cigarette Smoking Act of 1969

encompasses common law, and "state law" encompasses common law); *Norfolk & W. Ry.*, 499 U.S. at 128 ("all other law" in Interstate Commerce Act encompasses common law); *Illinois v. City of Milwaukee*, 406 U.S. at 100 ("laws" in 28 U.S.C. § 1331(a) encompasses common law); *Erie R.R. v. Tompkins*, 304 U.S. at 71, 79 ("laws of the several States" in Federal Judiciary Act of 1789 encompasses common law).

Moreover, those cases belie Petitioners' contention that " 'laws, regulations, and requirements' are all terms which connote legislative or executive decision-making processes, as opposed to common law liability." (Pet. Br. 25. *Accord* TLPJ Br. 19.) Each of those cases involved a federal statute using either "laws" or "requirements," and in each of those cases this Court interpreted the word to encompass common-law standards or requirements.

Cipollone is especially instructive. The preemption provisions at issue there were in the Federal Cigarette Labeling and Advertising Act ("the 1965 Act") and the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"). The preemption provision of interest here is that of the 1969 Act, which stated:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b). As is evident, that preemption provision made no mention of "common law," but instead contained only the phrase "no requirement or prohibition." Nevertheless, this Court held that the provision

expressly preempted a variety of common-law claims, as well as regulations and statutes.

In explaining why the 1965 Act, unlike the 1969 Act, did not preempt common-law claims, the Court emphasized that the 1965 Act stated that its purpose was only to prevent nonuniform "regulations":

> This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health." . . . [T]he term "regulation" most naturally refers to positive enactments by those bodies [of legislatures and agencies], not to common law damages actions.

Cipollone, 505 U.S. at 519 (emphasis in original). The Court then noted that, in contrast, the 1969 Act's preemption provision was *not* expressly limited to "regulations," but instead addressed state "requirements and prohibitions," and therefore preempted common-law claims as well as regulations:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statements" but rather "requirement[s] or prohibition[s] . . . imposed under State law."

Id. The Court then further explained:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law

> rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

Cipollone's preemption analysis is equally applicable here. The Boat Safety Act's preemption provision expressly encompasses not only state "regulation[s]," but state "law[s]," that "establish[ ] . . . performance or other safety standard[s]" or "impos[e] . . . requirement[s]." 46 U.S.C. § 4306. Because, as stated in *Cipollone*, " 'regulation' " most naturally refers to positive enactments" by legislatures and agencies, the word "law" in the phrase "law or regulation" should be read to include common law; otherwise, "law or regulation" would be redundant.

Also, like the 1969 Act's phrase "requirement or prohibition," the Boat Safety Act's phrases "law or regulation," "performance or other safety standard," and "requirement" are terms that, especially as a group, "sweep[ ] broadly and suggest[ ] no distinction between positive enactments and common law," and "easily encompass obligations that take the form of common-law rules." *Cipollone*, 505 U.S. at 521. And it is as true here as it was in *Cipollone* that the intent of the preemption provision would be thwarted if the provision were held inapplicable to common-law standards and requirements, because "[t]he obligation to pay compensation can be,

indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.*

The use of the word "standard" in section 4306 is especially telling, and the Solicitor General is quite wrong in asserting that " 'standard' 'would not ordinarily be thought to include duties of care that derive from the process of common-law adjudication.' " (U.S. Br. 17 (quoting U.S. Amicus Br., No. 94-286, at 13).) Indeed, the Solicitor General employs exactly that usage by elsewhere stating, "[U]nder one reading of the saving clause, a common-law claim would be permitted . . . unless that *claim propounded a standard of conduct* directly contrary to the federal rule." (U.S. Br. 27 (emphasis added).)

More importantly, for decades this Court has explicitly referred to common-law rules as "state safety standards" or "state standards." *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "state safety standards" set by California product liability common law); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987) (noting "possibility that [the defendant] will have to meet a number of different standards" if sued under different states' common law); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (referring to "imposition of a state standard in a damages action"); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959). Thus, the Court repeatedly has confirmed that the ordinary meaning of "standards," when referring to legal standards, includes judicial, as well as regulatory and statutory, standards.

Petitioners and their *amici* attempt to circumvent those cases by arguing that in the Boat Safety Act "the term 'standard' refers to regulatory standards the Coast Guard may enact under section 4302 [and it] is a bedrock principle of statutory interpretation that 'a word is presumed to have the same meaning in all subsections of the same statute.' " (Pet. Br. 26. *Accord* U.S. Br. 18; TLPJ Br. 18.) But that argument misapplies the presumption on which it relies.

First, the preemption provision, section 4306, does not refer only to "regulations" that establish "standards"; rather, it refers more broadly to any "law or regulation establishing a . . . safety standard or imposing a requirement. . . . " Since section 4302 refers only to "regulations establishing . . . standards," the portion of section 4306 that refers to any *"law or* regulation establishing a . . . standard *or imposing a requirement"* must be read to encompass something more than regulations that establish regulatory standards. Specifically, it must encompass "laws" that "establish[ ] standards" and "laws" that "impos[e] a requirement," where "laws" means something other than the "regulations" that are expressly referred to in tandem with, and thus are distinct from, "laws" in section 4306.[6]

---

[6] The Solicitor General argues that section 4306's reference to " *'a* law or regulation . . . *imposing* a requirement' . . . is more naturally read to refer only to state positive law imposing prescriptive requirements. . . . " (U.S. Br. 18 n.9 (emphasis in U.S. Br.).) Not so. In *Cipollone* this Court held common-law standards encompassed by a preemption provision that spoke only of " 'requirement[s] or prohibition[s] . . . *imposed under* State law.' " *Cipollone*, 505 U.S. at 521 (emphasis added). *See CSX Transp. Inc.*

In addition, Petitioners themselves concede that the mere fact that the word "standard," as used in section 4302 and some other provisions, refers to standards established by Coast Guard regulations does not mean that "standard," as used in section 4306, refers solely to standards established by regulations. Specifically, Petitioners and their *amici* explicitly assert that in section 4306 "Congress intended the term 'standard' to refer to state *legislative or* administrative enactments. . . . " (Pet. Br. 26-27 (emphasis added). *Accord* U.S. Br. 18; TLPJ Br. 19.) Thus, Petitioners and their *amici* admit that "standard," as used in section 4306, cannot properly be interpreted to mean only standards established by regulations.

Petitioners and their *amici* are also incorrect in arguing that common-law standards established by the courts of a state are not established by a "State or political subdivision of a state." (Pet. Br. 26; U.S. Br. 11, 18-19; TLPJ Br. 19-20.) As shown above, this Court repeatedly has referred to common-law tort standards as *"state* safety standards" and *"state* standards." (*See* cases cited at p. 11, *supra*.)

Moreover, in *Cipollone* this Court explicitly rejected the argument that common-law standards established by state courts are not obligations or requirements

---

v. Easterwood, 507 U.S. 658, 664 (1993) (finding express preemption of "[l]egal duties *imposed . . . by* the common law") (emphasis added); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (holding common-law claims impliedly preempted because "[a] system under which each State could, *through its courts, impose* . . . its own . . . *requirements* could hardly be more at odds with the uniformity contemplated by Congress") (emphasis added).

" 'imposed under State law.' " *Cipollone*, 505 U.S. at 521. The Court noted:

> At least since *Erie R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations.

Id. And in *Medtronic* the preemption provision that a majority of the Court held applicable to common-law standards used the identical phrase used in the Boat Safety Act – "State or political subdivision of a State" – to describe the bodies or entities whose requirements were preempted by federal law under the Medical Device Amendments of 1976. Thus, the Boat Safety Act's preemption of actions by a "State" to establish or enforce a "standard" or "requirement" includes actions by state courts, as well as actions by state legislatures and agencies.

The Solicitor General also argues that "State" must not include a state's judiciary because section 4306 contains an exception that permits a state, "in the absence of the Secretary's disapproval, [to] regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." Specifically, the Solicitor General argues that this must be so because "state judicial officers do not petition the Secretary of a federal department for permission to proceed with a state lawsuit." (U.S. Br. 11. *Accord id.* 18-19.)

That is a *non sequitur*. The exception merely describes certain circumstances in which a state may "regulate" certain boating activities; it does not say that a state may "establish, continue in force, or enforce a law" under

those circumstances. Thus, the exception by its terms applies only to the "regulation" portion of the preemption provision, not to the "law" portion. Because, as this Court stated in *Cipollone*, " 'regulation' most naturally refers to positive enactments by [legislatures and agencies]," the exception's use of the word "regulate" in connection with the exception that requires approval of the federal agency plainly indicates that the exception applies only to state legislative and administrative action, not to judicial actions covered by the word "law" in the preemption provision.[7]

The Solicitor General next argues that because 46 U.S.C. section 4302(a) authorizes the Secretary to "prescribe regulations establishing minimum safety standards," Congress must have intended the federal requirements to be only a "floor with respect to safety measures that manufacturers must adopt," not a ceiling

---

[7] TLPJ asserts that "no one would ordinarily describe an award of damages by a jury or judge as being *issued* by a 'State or political subdivision of a State.' " (TLPJ Br. 20 (emphasis added).) But section 4306 does not speak in terms of laws, standards, or requirements "issued" by a state; rather, it speaks in terms of laws, standards, or requirements "establish[ed], continue[d] in effect, or enforce[d]" by a state, and it is quite common to describe common-law standards as being established or enforced by the courts.

Similarly, TLPJ asserts that "it is impossible to say that a *federal* jury or judge is in any sense a 'State or political subdivision thereof.' " (TLPJ Br. 20 (emphasis in original).) But it is not at all unusual, much less impossible, to say that a federal judge has enforced common-law standards established by the courts of the state whose substantive law the federal court is applying under diversity jurisdiction.

limiting the states' power to impose more stringent requirements. (U.S. Br. 20-21.) But that argument suffers from two fatal flaws.

First, the argument suggests that the safety standards adopted by the Secretary were intended to establish only a floor because of their "minimum" nature and that Congress wanted to leave the states free to require manufacturers to meet more stringent standards. That, however, is not an argument that supports an interpretation of section 4306 that would preempt state statutes and regulations, but not state common law; rather, it is an argument that would support omitting a preemption provision from the Boat Safety Act. Obviously, Congress rejected that route.

Second, the argument suggests that, by using the word "minimum" in section 4302, Congress meant that the safety standards to be promulgated by the Secretary were to provide only minimum safety, but section 4302 cannot properly be so construed. Immediately after authorizing the Secretary to prescribe "regulations establishing minimum safety standards," the statute states that each standard must "meet[ ] the need for recreational vessel safety." The latter language shows that the standards are required to meet the need for vessel safety, not merely to provide some minimal, inadequate level of safety that has to be supplemented by the states. Properly understood, therefore, the word "minimum" simply means that manufacturers cannot legally sell recreational vessels that fail to comply with the standards established by the Secretary's regulations. *Cf.* 46 U.S.C. § 4307 (prohibiting the manufacture, construction, assembly, sale, offer for sale, delivery, or importing of any recreational

vessel, associated equipment, or component thereof that fails to comply with "a regulation prescribed under this chapter").

The First Circuit has reached exactly this conclusion with respect to the identical "minimum standards" language in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1391, recodified at 49 U.S.C. § 30102(a)(9). The court stated: "Although the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law." *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Moreover, the Secretary has likewise stated of that statute:

> The word "minimum" in the statutory definition of motor vehicle safety standards . . . does not refer to the substantive content of the standards but rather to their legal status – that the product covered must not fall short of them.

41 Fed. Reg. 3291, 2392 (Jan. 16, 1976). For the same reason, the word "minimum" in the Boat Safety Act cannot properly be given the meaning "minimal" suggested by the Solicitor General.

Finally, as a simple matter of common sense and sound statutory interpretation, section 4306 cannot reasonably be interpreted to preempt substantive tort standards established by statutes and not to preempt substantive tort standards established by common law. Suppose, for example, that (1) the Georgia state courts had held for years that the common law in Georgia established no duty on the part of boat manufacturers to install some type of anti-tip mechanism to prevent boats

from tipping over, *cf., e.g., Delvaux v. Ford Motor Co.*, 764 F.2d 469, 473-74 (7th Cir. 1985) (applying common law of Wisconsin and holding that, as a matter of law, a convertible automobile is not unreasonably dangerous because of the absence of a roll bar); (2) in 1997 the Georgia Legislature enacted a statute legislatively overruling that decision and providing that plaintiffs could sue boat manufacturers in tort for damages arising out of accidents involving boats without anti-tip mechanisms; (3) the Alabama state courts, like the Georgia state courts, also had held for years that the common law established no duty to install anti-tip mechanisms on boats; and (4) in 1997 the Alabama Supreme Court held that Alabama common law had changed and had come to impose a duty to install anti-tip mechanisms in boats. Under these assumptions, Petitioners and their *amici* could not argue that plaintiffs bringing suits in either state in 1998 would be "asking a federal district court to allow the application of the forum's long-standing common law." (Pet. Br. 26. *Accord* TLPJ Br. 19.) Nevertheless, under the preemption interpretation advocated by Petitioners and their *amici*, plaintiffs in Alabama could sue in tort to enforce the newly-established common-law duty, but plaintiffs in Georgia could not sue in tort to enforce the newly-established statutory duty. Given the substantial amount of tort law that has been codified in various states in recent years, this is hardly a far-fetched hypothetical. *See, e.g.*, Ala. Code §§ 6-5-500 *et seq.*; La. Code §§ 2800.52 *et seq.*; Tenn. Code Ann. §§ 29-28-101 *et seq.* Congress cannot reasonably be thought to have intended such disparate treatment of plaintiffs based solely on whether the duty

sought to be enforced has its origin in a state statute or instead in a state's common law.

II. 46 U.S.C. SECTION 4311(g) DOES NOT LIMIT THE SCOPE OF THE BOAT SAFETY ACT'S PREEMPTION PROVISION, BUT INSTEAD NEGATES COMPLIANCE WITH FEDERAL REGULATIONS AS AN AFFIRMATIVE DEFENSE

Petitioners and their *amici* argue that "Congress expressly preserved common law from pre-emption by including it in the savings clause [section 4311(g)]." (Pet. Br. 30. *See* U.S. Br. 11; TLPJ Br. 20.) In fact, however, section 4311(g) does *not* expressly refer to preemption. Instead, its language, whether considered alone, considered together with the language of section 4306, considered in light of the Boat Safety Act's statutory structure, or considered in light of the legislative history, shows that section 4311(g) does not limit the preemptive scope of section 4306 at all; rather, section 4311(g) negates compliance with federal standards or regulations as an affirmative defense.

Section 4311(g) states, "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." It does not mention preemption, federal supremacy, or the Supremacy Clause. Also, unlike section 4306, which was enacted, and still appears, under the title "Federal preemption," it was enacted under the title "Saving Clause" and now appears under the title "Penalties and injunctions." *Compare* 85 Stat. 217 (1971) *and* 46 U.S.C. § 4306 *with* 85 Stat. 228

(1971) *and* 46 U.S.C. § 4311(g). *See generally I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of a statute or section can aid in resolving ambiguity in legislation's text).

Not only does the language of section 4311(g) not refer in any way to preemption or federal supremacy, but it differs demonstrably from the language commonly employed by Congress in saving clauses that are intended to restrict the preemptive scope of a federal statute. Virtually every preemption-limiting saving clause interpreted by this Court in the last several decades has contained language that is clearly anti-preemptive and is wholly unlike that used in section 4311(g). *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies"); *Cipollone*, 504 U.S. at 518 (referring to saving clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person"); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (interpreting saving

clauses of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-7 and 2000h-4; the first of these provided, "Nothing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State. . . . "; the second stated, "Nor shall any provision of this Act be construed as invalidating any provision of State law"); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting saving clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "The provisions of this Act . . . shall not be held to exempt or relieve any person from any liability . . . provided by any present or future law of . . . any State"), *aff'd*, 444 U.S. 911 (1979); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210 (1986) (interpreting saving clause of Death on the High Seas Act, 46 U.S.C. § 767, which states, "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter.").

This stark difference between the affirmative-defense "compliance with" language of section 4311(g) and the preemption-limiting language regularly employed by Congress in other statutes cannot be ignored. As this Court has emphasized, "Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ." *Offshore Logistics*, 477 U.S. at 222.

The "compliance with" language of section 4311(g) in fact would be quite inconsistent with a preemption-limiting interpretation. To determine whether or not federal law preempts an asserted state law, a court does not even ask whether a defendant complied with a federal standard; rather, the court (1) examines the state law asserted by the plaintiff to have been violated, (2) examines the

federal law asserted by the defendant to be preemptive, and (3) determines whether the asserted state law either is encompassed by the federal preemption statute or conflicts with the federal purposes and policies. *If* the federal preemption provision does not encompass the asserted state law, and *if* there is no conflict between the federal and state laws, there is no preemption; *then* the case may go forward, and *then* the defendant may seek to prove compliance with the federal law and argue either that such compliance constitutes a defense or that the evidence of compliance at least may be considered by the jury. By providing that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law," section 4311(g) precludes the use of compliance as a complete defense *at trial* and ensures that evidence of compliance will have only its traditionally limited role as evidence that the jury may consider in determining the reasonableness of the defendant's conduct.[8]

The legislative history of section 4311(g) strongly supports this interpretation. It was added as an amendment by the Senate after the following request was made by Richard Schwartz, Executive Director of the Boat Owners Association of the United States:

> [W]e would recommend a savings provision with respect to the consumers' private remedies,

[8] A state court could still conclude that, as a matter of state policy, compliance should be a complete defense. Section 4311(g) *permits* a state court to reach that conclusion, but expresses Congress' intent not to mandate it.

> which is not touched upon by the present Bill. *We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturers from liability under State or common law in private law suits. It should be made clear that this Act does not preempt state or common law.*

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 88 (1971) (emphasis added). Despite having received an explicit request for a provision to ensure that compliance would not be a defense *and* a provision to ensure that the Boat Safety Act would not preempt state or common law, Congress chose to include a preemption provision, to omit any language that would have "made it clear that this Act does not preempt state or common law," and to act favorably only on that part of the request aimed at compliance as a defense.

In describing the purpose of the amendment, the Senate Report made it even clearer that the focus was on the effect of compliance evidence, not on the scope of preemption. The report stated:

> The purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act *will not be a complete defense* to liability. Of course, depending on the rules of evidence of the particular judicial forum, *such compliance may or may not be admissible for its evidentiary value.*

S. Rep. No. 92-248, 92d Cong., 1st Sess. 32 (1971), *reprinted in* 1972 U.S. Cong. & Admin. News 1333, 1352 (emphasis

added). This statement of purpose explicitly aims to negate "mere compliance" as "a complete defense," and to permit states to allow the admissibility of compliance evidence. It has nothing to do with preemption.

There is still another aspect of the language of section 4311(g) that is inconsistent with the argument of Petitioners and their *amici*. The statute states that compliance "does not relieve a person from liability at common law *or under State law*." As discussed above, however, Petitioners and their *amici* have argued that the conjunction of "State" and "law" in section 4306 must be interpreted to preempt state legislative and administrative laws (*see* pp. 4-6, *supra*), and that the same meaning must be given to words wherever they appear in the Boat Safety Act (*see* pp. 12-13, *supra*). Under that argument, therefore, "State law" in section 4311(g) would have to be interpreted to mean "state statutes and regulations," and section 4311(g) would preserve from preemption all state common law, all state statutes, and all state regulations. The "saving clause" would swallow, not limit, the preemption provision. Plainly, that is too absurd to have been Congress' intent.

Finally, the interpretation of sections 4306 and 4311(g) advanced by Petitioners and their *amici* ignores this Court's admonition that, in interpreting an express preemption provision like section 4306, "[e]vidence of pre-emptive purpose is sought in the text *and structure* of the statute at issue." *Easterwood*, 507 U.S. at 664 (emphasis added). *Accord Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 112 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). The structure of the Boat Safety Act, like the language itself, shows that section 4311(g)

was never intended to be the sweeping exception to section 4306 that Petitioners and their *amici* claim it to be.

Section 4311(g) appears five full sections after what is undeniably the preemption provision, section 4306, and section 4311(g) does not refer back to section 4306 in any way. In fact, the two sections as originally enacted were 30 sections apart. *See* 85 Stat. 217, 228 (1971). That structural fact alone suggests that section 4311(g) does not address preemption and was not intended to limit section 4306.

In addition, section 4306 itself contains saving language that does clearly limit the preemptive scope in two ways. First, section 4306 explicitly permits the states to establish, continue in effect, or enforce any law or regulation "that is . . . identical to a regulation prescribed under section 4302 of this title." Second, section 4306 explicitly permits any state to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," as long as the Secretary has not disapproved the regulatory action. This additional structural fact suggests that, if Congress had intended section 4611(g) to constitute a third – and by far the most sweeping – exception to the preemption provision, Congress would have included the language of section 4311(g) in its logical place, adjacent to the two saving clauses explicitly stated in the preemption provision itself.

Thus, the statutory structure of the Boat Safety Act, like its text and legislative history, shows that section 4311(g) was never intended to address preemption and

was never intended to create a sweeping exception to section 4306.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MALCOLM E. WHEELER*
PARCEL, MAURO, HULTIN & SPAANSTRA, P.C.
1801 California Street
Suite 3600
Denver, Colorado 80202
(303) 292-6400

*Counsel of Record for Product Liability Advisory Council, Inc.

Of Counsel:

HUGH F. YOUNG, JR.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, Virginia 22091
(703) 264-5300

January 1998

APPENDIX A
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
CORPORATE MEMBERS

3M

ACRISON, Inc.

Allegiance Healthcare Corporation

Allied Signal, Inc.

Aluminum Company of America

American Automobile Manufacturers Assn.

American Brands, Inc.

American Home Products Corporation

American Suzuki Motor Corp.

Andersen Corporation

Anheuser-Busch Companies

Atlantic Richfield Company

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Becton-Dickinson & Company

Beech Aircraft Corporation

BIC Corporation

Black & Decker (U.S.) Inc.

BMW of North America, Inc.

Boeing Company, The

Bridgestone/Firestone, Inc.

Briggs & Stratton

Bristol-Myers Squibb Company

Brown-Forman Corporation

Budd Company, The

C.R. Bard, Inc.

Caterpillar, Inc.

CBI Industries, Inc.

Chrysler Corporation

Ciba-Giegy Corporation

Clark Material Handling Company

Coleman Company, Inc., The

Continental General Tire, Inc.

Coors Brewing Company

Corning Incorporated

Daewoo Motor America

Dana Corporation

Deere & Company

Dow Chemical Company, The

E. & J. Gallo Winery

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Estee Lauder Companies

Exxon Corporation, U.S.A.

FMC Corporation

Ford Motor Company

Freightliner Corporation

Gates Rubber Company, The

General Electric Company

General Motors Corporation

Glaxo Wellcome Co.

Goodyear Tire & Rubber Company, The

Great Dane Trailers, Inc.

Guidant Corporation

Harnischfeger Industries Inc.

Heil Company, The

Hoechst Celanese Chemical Group, Inc.

Hoechst Marion Roussel, Inc.

Honda North America, Inc.

Hyandai Motor America

International Paper Company

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Kaiser Aluminum & Chemical Corporation

Kawasaki Motors Corp., U.S.A.

Kolcraft Enterprises, Inc.

Kraft Foods, Inc.

Loewen Group International, Inc.

Lorillard Tobacco Company

Lucent Technologies Inc.

Mack Trucks, Inc.

Maytag Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Melroe Company

Mercedes-Benz of N. America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R. & D. of America, Inc.

Monsanto Company

Motorola, Inc.

Navistar International Transportation Corp.

Nissan North America, Inc.

O.F. Mossberg & Sons, Inc.

Otis Elevator Co.

Owens-Corning Fiberglas Corporation

PACCAR Inc

Panasonic Company

Pentair, Inc.

Pfizer Inc

Pharmacia and Upjohn, Inc.

Philip Morris Companies, Inc.

Porsche Cars North America, Inc.

Procter & Gamble Co., The

Raymond Corporation, The

RJ Reynolds Tobacco Company

Rover Group, Ltd.

Schindler Elevator Corp.

Sears, Roebuck & Company

Shell Oil Company

Sherwood, a Division of Harsco Corporation

Siemens Energy & Automation, Inc.

Smith & Nephew Richards, Inc.

SmithKline Beecham Corporation

Snap-on Incorporated

Sofamor Danek Group, Inc.

Sturm, Ruger and Co., Inc.

Subaru of America

Textron, Inc.

Thomas Built Buses, Inc.

Toro Company, The

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Westinghouse Electric Corporation

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

(9)

FILED
DEC 29 1997
CLERK

No. 97-288

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

VICKY LEWIS, *et al.*,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS

Leslie A. Brueckner, Esq.
(Counsel of Record)
Arthur H. Bryant, Esq.
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*

December 29, 1997

---

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

A. The Coast Guard's Decision Not To Regulate Propeller Guards 2

B. The Proceedings Below 6

SUMMARY OF ARGUMENT 6

ARGUMENT:

THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS DOES NOT PREEMPT PETITIONERS' COMMON-LAW CLAIMS 8

I. Under *Myrick*, The Coast Guard's Decision Not To Regulate Propeller Guards Leaves The States Free To Act As They Wish 8

II. Even If The Coast Guard's Decision Not To Regulate Propeller Guards Preempts State Regulation, It Does Not Expressly Or Impliedly Preempt Petitioners' Common-Law Claims 17

A. Petitioners' Claims Are Not Expressly Preempted Because Congress Expressly Preserved Them 17

1. The Boat Safety Act's Preemption Provision Does Not Encompass Common-Law Claims 17

2. The Boat Safety Act's Savings Clause Expressly Preserves Common-Law Claims 20

B. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved Common-Law Claims 24

C. Even Assuming That Implied Preemption Analysis Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page:**

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 19

Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 11

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 14

California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 9

Carstensen v. Brunswick Corp., 49 F.2d 430 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995) 23

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1993) 1, 23, 24, 26

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 18

English v. General Electric Corp., 496 U.S. 72 (1990) 9

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) 13, 14

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) . . . . . *passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 23

Hillsborough County, Fla. v. Auto Med. Labs., 471 U.S. 707 (1985) 14, 15, 27

Hines v. Davidowitz, 312 U.S. 52 (1941) 14

Medtronic v. Lohr, 116 S. Ct. 2240 (1996) . . . . . *passim*

Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994) 18, 29-30

Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs, 461 U.S. 624 (1983) 18

Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991) 23

Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978) 10

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 496 (1988) 11

Rice v. Santa Fe Elevator Corp., 337 U.S. 218 (1947) 8, 13, 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 14

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) . . . 9

United States v. James, 478 U.S. 597 (1986) 21

Statutes and Regulations:

5 U.S.C. § 553 (1994) 5

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) 10

Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301 *et seq.* (1988 & Supp. V. 1993) . . . . . *passim*

46 U.S.C. § 4302(a)(1) 3, 13, 18

46 U.S.C. § 4302(a)(2) 18

46 U.S.C. § 4302(c)(4) 3

46 U.S.C. § 4304 18

46 U.S.C. § 4306 . . . . . *passim*

46 U.S.C. § 4311(f)(1) 18

46 U.S.C. § 4311(f)(2) 18

46 U.S.C. § 4311(g) . . . . . *passim*

49 C.F.R. § 571.121(S3) (1993) 10

Legislative History:

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 . . . . 15-16, 22, 29

INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Through involvement in precedent-setting and socially significant litigation, TLPJ seeks to ensure that tort law fully serves its dual purposes -- compensating those injured by wrongful conduct and deterring similar conduct in the future. TLPJ is gravely concerned that, if the tort system is closed to innocent victims of unguarded boat propellers through improper application of the preemption doctrine in this case, neither of these purposes will be served.

This case, moreover, has implications far beyond the narrow issue of preemption under the Federal Boat Safety Act of 1971. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the Eleventh Circuit's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on the States' regulatory powers and/or strip individuals of their common-law remedies. This approach turns the "strong presumption against pre-emption," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1993), on its head and creates, in its place, a powerful presumption in *favor* of federal preemption that arises simply by virtue of agency *in*action. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for either party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

injuries caused by dangerous products, but it would strip States of their historic power to protect the health and welfare of their citizens. Reversal is appropriate to prevent this deep encroachment on the rights of States to protect their citizens and the rights of citizens to use the common law to protect themselves -- rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

STATEMENT

This case presents the question of whether a claim that a boat engine was defective because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301 *et seq.* (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision by the United States Coast Guard *not* to issue regulations requiring propeller guards on all motor boats. The Eleventh Circuit held that such claims are impliedly preempted by the Act, even though: (1) there is no federal regulation or standard relating to propeller guards; (2) the Boat Safety Act's preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]," 46 U.S.C. § 4306; and (3) the Act's savings clause provides that compliance with any such regulations issued thereunder "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). That decision is in direct conflict with *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and cannot be reconciled with the plain language of the Boat Safety Act, which expressly preserves *all* common-law claims.

A. The Coast Guard's Decision Not To Regulate Propeller Guards.

In recent years, public attention has become increasingly focused on motor-boat propellers "as instruments of devastation that are injuring and killing large numbers of people." Joint

Appendix ("J.A.") 174. Propeller-related injuries "are often characterized by massive trauma, including significant blood loss or death." J.A. 170. Between 1976 and 1990, the Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its *Boating Statistics* category "struck by boat or propeller" -- an average of approximately 100 per year. *Id.*

The injuries associated with unguarded boat propellers have given rise to numerous lawsuits against marine engine manufacturers since the 1970s. J.A. 239. However, despite this litigation, as of 1992, no major marine engine manufacturer had equipped any of its boats with any type of propeller guard to protect people in the water. *Id.*

The growing public controversy over the use of propeller guards led the Coast Guard to consider whether to begin the process of developing a federal regulation mandating their use on passenger boats. Under the Boat Safety Act, the Coast Guard has the authority to "prescribe regulations establishing minimum safety standards" for recreational boats. 46 U.S.C. § 4302(a)(1). The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. *See id.* § 4302(c)(4). In 1988, at the Coast Guard's request, a subcommittee of the Advisory Council (the "Subcommittee") was formed to investigate the feasibility of requiring guards to prevent underwater propeller accidents. *See* J.A. 46.

In November 1989, the Subcommittee recommended that the agency take no regulatory action regarding propeller guards. Although it recognized the hazards presented by unguarded boat propellers, it found that

> [n]o simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the

> some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

J.A. 71. *See also* J.A. 73 ("there are no indications that there is a generic or universal solution currently available or foreseeable in the future.") Thus, the Subcommittee concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.*[2]

The Advisory Council subsequently adopted the Subcommittee's recommendation that the Coast Guard not issue regulations requiring propeller guards on all recreational boats. J.A. 138. However, in response to a presentation by a propeller strike victim that the search for new technology should continue, the Advisory Council's Chair "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." J.A. 139.

On February 1, 1990, the Coast Guard adopted the Advisory Council's recommendation that it "take no regulatory action to require propeller guards." J.A. 163. In a letter memorializing its decision (the "Coast Guard Letter"), a Coast Guard official reiterated the concern that there was no universal solution currently available to solve the propeller guard problem:

---

[2] In its report, the Subcommittee also discussed that "[a] number of lawsuits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." J.A. 50-51. The Subcommittee went on to note that, if the Coast Guard were to adopt a regulation mandating propeller guards, "[s]uch mandate would . . . establish prima facie manufacturer liability in having failed to provide them." J.A. 51. It said nothing about what effect, if any, a decision *not* to issue a regulation would have on those lawsuits.

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Id. The Coast Guard Letter added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." *Id.* At no point did the Coast Guard Letter -- or anything else issued by the Coast Guard -- indicate that the agency intended to ban state regulation with respect to propeller guards, or to preempt common-law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. The Coast Guard Letter describing the agency's decision not to regulate was not exposed to public notice and comment and it was never published in the *Federal Register*. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

B. The Proceedings Below.

On June 6, 1993, petitioners' daughter, Kathryn Lewis, was thrown from a passenger boat and killed by the unguarded

propeller of an engine manufactured by respondent Brunswick Corporation. Her parents sued respondent for common law negligence, product liability, and fraudulent misrepresentation, alleging primarily that the engine should have had a propeller guard. The district court granted respondent' motion for summary judgment on the ground that petitioners' common-law claims are preempted by the Boat Safety Act. Petitioners' Appendix ("P.A.") 26-32. The Eleventh Circuit affirmed, holding that, although the Act does not expressly preempt common-law claims, petitioners' claims are impliedly preempted because, if permitted to go forward, they would conflict with the Coast Guard's decision *not* to issue a regulation requiring propeller guards on all passenger boats. P.A. 3, 24-25.

SUMMARY OF ARGUMENT

In determining whether a state cause of action is preempted by federal law, a court's sole task is to ascertain the intent of Congress. This determination of Congressional intent is not made in a vacuum; rather, it is informed by a strong presumption against preemption that can be overcome only by a clear manifestation of Congressional intent to the contrary.

Seen in this light, the lower court clearly erred in finding petitioners' common-law claims preempted by the Boat Safety Act. First, as a threshold matter, there can be no finding of preemption here *because the Coast Guard has not issued any regulation regarding propeller guards*. Instead, after an internal review that never reached the rulemaking stage, the agency decided that regulatory action was not warranted at that time. Finding preemption under this circumstances is squarely at odds with *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), where this Court held that federal regulatory inaction does not preempt the States' power to act.

Even assuming, however, that the Coast Guard's decision not

to regulate propeller guards could preempt the States' power to regulate, it still would not preempt petitioners' common-law claims. The reason is simple: the Boat Safety Act makes clear that Congress did not intend to preempt *any* common-law claims. The language of the preemption provision shows that Congress merely intended to preempt state *legislative* or *administrative* safety standards that are not identical to federal safety standards, and not to preempt common-law tort actions. *See* 46 U.S.C. § 4306. The Act's savings clause, moreover, states in sweeping terms that "compliance with standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Both the plain language of this "anti-preemption" provision and its legislative history make plain that petitioners' claims are expressly *preserved*, not preempted.

That being so, the Eleventh Circuit erred in even considering whether petitioners' claims are impliedly preempted by the Act. This Court has made clear that, where Congress has spoken directly and clearly on the issue of preemption -- as it did in the Boat Safety Act -- there can be no finding of implied preemption. Because the Act contains both an express preemption provision and an express "anti-preemption" provision manifesting a Congressional intent *not* to preempt, any inquiry into implied conflict preemption is precluded.

In any event, there is no implied conflict preemption here since petitioners' claims do not conflict with the Coast Guard's decision *not* to regulate propeller guards. Implied preemption only lies where it is impossible for a private party to comply with both state and federal requirements or where state law would frustrate the full purposes and objectives of Congress. "Impossibility" is not an issue here, because federal law imposes no requirements whatsoever regarding propeller

guards. Thus, respondent can do whatever is necessary to comply with Georgia law -- including compensating petitioners for their injuries -- without running afoul of federal law. Similarly, petitioners' claims would not "frustrate" Congress' purposes, since a federal decision *not* to regulate propeller guards in no way conflicts with a common-law claim that a specific engine design was defective because it lacked a propeller guard. Moreover, a claim that a specific boat engine is unsafe because it lacks a propeller guard is entirely consistent with the central goal underlying the Act: improving boat *safety*. Thus, there can be no holding of express or implied preemption in this case.

ARGUMENT

THE COAST GUARD'S DECISION NOT TO REGULATE PROPELLER GUARDS DOES NOT PREEMPT PETITIONERS' COMMON-LAW CLAIMS.

This case is governed by two bedrock legal principles regarding federal preemption. *First*, as this Court recently reaffirmed in *Medtronic v. Lohr*, 116 S. Ct. 2240, 2250 (1996), a party arguing that federal law preempts state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." This presumption against preemption is even stronger where, as in this case, preemption would displace the historic power of the States to protect the health and safety of their citizens. *See Rice v. Santa Fe Elevator Corp.*, 337 U.S. 218, 230 (1947). Moreover, where preemption of common-law claims would leave injured individuals without any state *or* federal remedy, which is the result sought by respondent, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464

U.S. 238, 251 (1984).

Second, in determining whether a state cause of action is preempted by federal law, the Court's "sole task is to ascertain the intent of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (plurality opinion). *See also Medtronic*, 116 S. Ct. at 2250 ("'[t]he purpose of Congress is the ultimate touchstone' in every preemption case.") (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). In *Medtronic*, this Court explained that "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." 116 S. Ct. at 2250-51. *Medtronic* added, however, that a court must also give close consideration to the "'structure and purpose of the statute as a whole,' . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 2251 (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992)).

Applying these standards here, only one conclusion can be reached: there is no preemption of petitioners' claims under the Boat Safety Act.

I. Under *Myrick*, The Coast Guard's Decision Not To Regulate Propeller Guards Leaves The States Free To Act As They Wish.

Respondent would have this Court believe that the core question in this case is whether the Boat Safety Act expressly or impliedly preempts common-law damages claims. But a key threshold question is whether the Coast Guard has taken sufficient regulatory action with respect to propeller guards to even reach that question. Under *Freightliner Corp. v. Myrick*,

115 S. Ct. 1483 (1995), the answer is plainly "no."

Myrick considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982) (the "Motor Vehicle Safety Act"), and by a federal motor vehicle safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered NHTSA to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, NHTSA added language to the regulation stating that the antilock brake provisions invalidated by *Paccar* "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common-law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no preemption because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers." 115 S. Ct. at 1487. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation." *Id.* Mere regulatory inaction, said the Court, carries no preemptive force

whatsoever, especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.*

Myrick mandates reversal of the decision below. In finding federal preemption of petitioners' common-law claims, the Eleventh Circuit embraced the very proposition that was rejected in *Myrick*: that "the absence of regulation itself constitutes regulation." *Id.* This ruling has the perverse effect of transforming a federal decision *not* to require propeller guards on all motor boats into an affirmative decision to *ban* any state regulation requiring a propeller guard on any motor boat, as well as any state common-law claim simply requiring a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. This result is contrary to *Myrick* and it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

In addition, here, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 115 S. Ct. at 1487. As explained above, the Coast Guard's decision not to even begin drafting a *federal* regulation requiring propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." J.A. 163. The agency never even

considered whether some or all *state* regulations (much less some or all common-law claims) were desirable. The Coast Guard also never considered, much less decided, whether there *some* technology appropriate for use in *some* boats. Rather, the agency merely found that there was no technology appropriate for a *national*, across-the-board regulation applicable to *all* types of boats. This determination is entirely consistent with -- and leaves the States free to adopt -- state regulations mandating propeller guards on specific boats or on boats used for a particular purpose. It is also, of course, entirely consistent with a finding that respondent acted negligently under Georgia common law by failing to install a propeller guard on the boat engine that killed Kathryn Lewis.

The Eleventh Circuit nonetheless distinguished *Myrick* on the theory that, in contrast to the Motor Vehicle Safety Act, the Boat Safety Act gives the Coast Guard exclusive authority to issue safety standards:

> While an absence of regulation under the [Motor] Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the [Boat Safety Act] means that no regulation, state or federal, is appropriate. [*Myrick*] is distinguishable for that reason.

P.A. 20. Based on its view that the Boat Safety Act only permits state regulations that are identical to federal standards, the Eleventh Circuit held that the Coast Guard's decision not to issue a regulation requiring propeller guards was more than just regulatory inaction, but rather demonstrated an intention to "mandate[ ] an absence of both federal and state propeller guard requirements." *Id.* (citations omitted).

This argument rests on the radical -- and wholly unsupported

-- notion that the Boat Safety Act essentially preempts the entire field of boat safety regulation. It is well established that courts may not infer Congressional authority to supercede the "historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Rice*, 337 U.S. at 230. "Federal occupation of a field of commerce may not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakenly so ordained." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

Here, there is no plausible argument that Congress has "unmistakenly ordained" its intent to preempt the entire field of state regulatory power with respect to boat safety. To begin with, the Boat Safety Act's express preemption clause contains no language barring States from regulating in the absence of federal action. Rather, it simply provides that "a State . . . may not establish . . . a [boat] safety standard . . . that is not identical to a regulation prescribed under section 4302." 46 U.S.C. § 4306. This language merely limits what a State can do in the event the Coast Guard *has* prescribed a regulation (*i.e.*, the State is limited to prescribing an identical standard); it says nothing about what a State can or cannot do where -- as here -- the Coast Guard has decided *not* to take any regulatory action. At the same time, another provision of the Boat Safety Act limits the Coast Guard's authority to prescribing "minimum safety standards" (46 U.S.C. § 4302(a)(1)) -- language that this Court has previously construed as *not* evidencing Congressional intent to preempt all safety regulation in a particular field. *See Florida Lime*, 373 U.S. at 147-48.

Of course, language accomplishing total preemption of the regulatory field would have been easy to fashion had Congress so intended. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S.

85, 96-101 (1983) (field preemption where federal law expressly preempted "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA); *Rice*, 337 U.S. at 233-35 (field preemption where federal law expressly states that "the power, jurisdiction, and authority conferred upon [the agency] under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said language remains in effect"). The absence of any such language in the Boat Safety Act demonstrates that Congress did not expressly preempt the entire field of state regulation in the boat safety area.

Nor could there be any claim that "the nature of the regulated subject matter" -- boat safety -- "permits no other conclusion" than that Congress intended to bar all state regulation in the area. *Florida Lime*, 373 U.S. at 142. Even the lower court recognized that the Boat Safety Act regulates an area (safety) that "historically has been regulated by the states through their police powers . . .." P.A. 14. This is therefore not a case where Congressional intent to preempt state law may be inferred from a "dominant federal interest" in the field. *Compare Hillsborough County, Fla. v. Auto Med. Labs.*, 471 U.S. 707, 718 (1985) (no dominant federal interest in regulating health and safety sufficient to support implied preemption of entire field of state regulation), *with Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988) (implying intent to preempt field from uniquely federal interest in liability of independent contractors performing work for federal government), *and Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (implying intent to preempt field from dominance of federal interest in foreign affairs).

Nor is this a case where the "scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."

Hillsborough, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230). The Act itself does not require the Coast Guard to prescribe *any* regulations governing boat safety; instead, it merely states that "[t]he Secretary *may* prescribe regulations . . . establishing minimum safety standards for recreational vessels . . .." 46 U.S.C. § 4302(a) (emphasis added). The fact that the agency has issued some regulations in the area of boat safety (although not with regard to propeller guards!) is hardly sufficient to infer Congressional intent to preempt the entire field of boat safety. *See Hillsborough*, 471 U.S. at 718 ("[w]e are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes").

Under the rubric of its "implied conflict preemption" analysis, however, the lower court held that Congress must have intended to preempt all state regulation because any other result would undermine "the need for uniformity applicable to vessels moving in interstate commerce." P.A. 19 (quoting S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1341).[3] This conclusion fails in light of the overriding purpose of the Boat Safety Act: to stem the "alarming" loss of life from boat accidents by requiring compliance with minimum safety standards. *See* S. Rep. No. 92-248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1334. Given this goal, it would have made no sense for Congress to have wiped out all existing state regulation of boat safety in one fell swoop, leaving *no* standards in effect unless and until the Coast Guard saw fit to promulgate minimum safety regulations.

---

[3] We note that it was error for the lower court to reach the question of implied field preemption in light of Congress' clearly expressed intention *not* to preempt all state regulation in the boat safety field. As explained below at II.B., a finding of implied preemption is prohibited where Congress' express language provides a "reliable indicium" of its intent with respect to preemption.

In short, by relying on one sentence in the Boat Safety Act's legislative history regarding a need for uniformity in boat safety standards, the Eleventh Circuit read the word "Safety" out of the Boat Safety Act. In light of Congress' overriding focus on actually *improving* boat safety -- and given the especially strong presumption against preemption of an entire field of state regulation -- that interpretation cannot stand. Thus, the lower court's attempt to distinguish *Myrick* on the theory that the Boat Safety Act -- unlike the Motor Vehicle Safety Act -- preempts the entire regulatory field is unavailing.

At bottom, the Coast Guard's decision not to regulate propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to regulate was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption simply does not exist under these circumstances. As a result, this Court need not reach the question of whether federal regulations actually issued under the Boat Safety Act would preempt state common-law claims.

II. Even If The Coast Guard's Decision Not To Regulate Propeller Guards Preempts State Regulation, It Does Not Expressly Or Impliedly Preempt Petitioners' Common-Law Claims.

A. Petitioners' Claims Are Not Expressly Preempted Because Congress Expressly Preserved Them.

Even assuming that the Coast Guard's decision not to regulate could have preemptive force under the Boat Safety Act (which it cannot), the Eleventh Circuit's finding that Congress *impliedly* preempted petitioners' common-law claims is in error for a simple reason: the Act makes crystal clear that Congress did not intend to preempt *any* common-law damages claims. Indeed, the two provisions of the Boat Safety Act that set forth Congress' intent with respect to preemption -- the preemption provision (46 U.S.C. § 4306) and the savings clause (46 U.S.C. § 4311(g)) -- reveal that common-law claims are *expressly preserved*, not preempted. That being so, the lower court erred in even considering whether -- much less finding that -- such claims are impliedly preempted.

1. The Boat Safety Act's Preemption Provision Does Not Encompass Common-Law Claims.

To begin with, the Act's express preemption clause does not encompass common-law claims. It provides that, subject to certain exceptions, "a State or political subdivision of a State may not establish, continue in effect, or enforce a *law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46

U.S.C. § 4306 (emphasis added). As the Texas Supreme Court held in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), there are numerous reasons why the phrase "law or regulation" in this section, standing alone, should not be read to include common-law claims at all. *See id.* at 249-50. Even the broadest reading of that phrase ultimately breaks down, however, in light of other aspects of the preemption provision that make clear that Congress never intended to preempt tort suits against boat manufacturers.

First, the preemption provision merely prohibits a State from imposing a nonidentical "law or regulation establishing . . . a performance or other *safety standard* or imposing a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). "Safety standard" is a term used at various places in the Act to refer to the *administrative* standards the Coast Guard is authorized to adopt pursuant to Section 4302. *See, e.g., id.* at § 4302(a)(1); § 4302(a)(2); § 4304; § 4311(f)(1); § 4311(f)(2). The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute"). *See also Medtronic*, 116 S. Ct. at 2252 (plurality opinion) (citing other uses of the term "requirements" throughout statute to demonstrate that Congress merely intended to preempt "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the

Act's preemption provision is that a "safety standard" promulgated under the Act (or a requirement for equipment associated with such a standard) will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.

Second, if Congress intended the preemption provision to apply to common-law claims, it would likely have chosen words that more clearly did so -- particularly since it referred specifically to common-law liability in the Boat Safety Act's savings clause. The term "safety standard" is hardly a clear reference to common-law claims. *See Medtronic*, 116 S. Ct. at 2251 (plurality opinion) ("if Congress intended to preclude all common-law causes of action, it chose a singularly odd word ['requirement'] with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any 'remedy' under state law relating to medical devices.").

Third, the preemption provision only applies to a safety standard "establish[ed], continue[d] in effect, or enforce[d]" by a "State or a political subdivision of a State." Construing an award of damages to a tort plaintiff as "establishing, continuing in effect, or enforcing" a boat safety standard is at odds with this Court's oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The duties relied on by tort claimants are general duties under the common law that have evolved over hundreds of years. While a jury award of damages would represent confirmation of a pre-existing common-law duty -- for instance, the duty to act non-negligently -- only an inept grammarian would describe an award of damages in a tort suit as "establishing, continuing in effect, or enforcing" a boat safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in

effect" or is "enforced."

Fourth, it makes no sense to construe the term "State or a political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. Thus, it was logical for Congress to include "political subdivisions" in the coverage of Section 4306, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a *federal* jury or judge is in any sense a "State or political subdivision thereof." Thus, the Boat Safety Act's express preemption provision cannot reasonably be read to encompass common-law claims.

2. The Boat Safety Act's Savings Clause Expressly Preserves Common-Law Claims.

If any doubt remained as to the inapplicability of the Boat Safety Act's express preemption provision to common-law claims, it would be dispelled by the Act's express *anti*-preemption provision -- the savings clause -- which plainly and unambiguously *preserves* all common-law claims. It states in simple and straightforward terms: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

On its face, the savings provision is sweeping and unambiguous. "Compliance with standards, regulations, or orders prescribed under this chapter" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular

question of design or performance at issue in a given common-law action. Similarly, the phrase "does not relieve a person from liability at common law or under State law" does not on its face admit of qualification. "[L]iability at common law or under State law" is all-inclusive. That phrase cannot fairly be read to mean that the Boat Safety Act provides any basis for exempting any defendant from any common-law liability. *See United States v. James*, 478 U.S. 597, 604 (1986) (the federal statute "outlines immunity in sweeping terms: 'No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place.' It is difficult to imagine broader language.") (emphasis in original).

Respondent nonetheless argues that the savings clause was merely intended to show "Congress' intent not to occupy the entire field of boat safety, so that common-law claims could continue to be brought in areas not covered by a federal safety standard." *See* Brief for Respondent in Opposition to Petition for Writ of *Certiorari* at 13. This argument fails for two reasons. First, as explained above, other provisions of the Boat Safety Act make crystal clear that Congress did *not* intend to preempt the field by prohibiting States from regulating in the absence of any federal safety standard. That being the case, there would have been no reason for Congress to carve out a special exception from field preemption for common-law claims.

Second, respondent's argument conflicts with the language of the savings clause itself, which broadly states that "[c]ompliance with . . . standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Under respondent's theory, this provision is merely designed to show that common-law damages claims survive field preemption in cases where the Coast Guard has not taken any regulatory action. But the

savings clause is worded much more broadly, and specifically applies in cases where the agency *has* issued a "standard[ ], regulation[ ], or order[ ]." In fact, it specifically provides that common-law claims may be brought *despite* a manufacturer's compliance with federal standards. Respondent's contrary interpretation simply makes no sense in light of the words chosen by Congress.

The Boat Safety Act's legislative history confirms that Congress enacted the savings clause to make crystal clear that common-law claims are not preempted under any circumstances. According to the Senate Report, the savings clause was

> intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of the section is to assure that in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability*. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

1971 U.S.C.C.A.N. at 1352 (emphasis added). This explanation hammers home what the language of the savings clause already reveals: that Congress did not intend to immunize boat manufacturers from any "product liability suits" when it passed the Boat Safety Act. To the contrary, Congress plainly intended to permit such suits to go forward even in cases where a manufacturer could demonstrate compliance with a minimum federal standard.

In short, the Boat Safety Act expressly and unequivocally preserves all common-law claims. Some courts have

nonetheless rejected this result on the theory that Congress could not logically have intended to permit common-law claims to proceed, despite their "regulatory effect," when state regulations addressing the same matters would be preempted. *See, e.g., Carstensen v. Brunswick Corp.*, 49 F.2d 430, 432 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991). Congress, however, has repeatedly preserved common-law claims, despite their arguably regulatory effect, while preempting direct state regulation -- and this Court has repeatedly recognized the reasonableness of this approach. For example, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court held:

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. *Cf. Silkwood v. Kerr McGee Corp.*, 464 U.S. at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted).

Id. at 185-86 (footnote omitted). *See also Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law [damages] actions.")

This approach, moreover, makes good sense. As respondent well knows, and Congress certainly understood when it passed

the Boat Safety Act, regulatory agencies are notoriously subject to capture by those they are intended to regulate and, even in the best circumstances, move laboriously and cautiously. Given the purpose of the Boat Safety Act, it was unquestionably reasonable for Congress to preempt state legislative and administrative standards that are different than federal regulations, but continue to allow the common-law tort system to play its traditional role of prompting the federal government and boat manufacturers to set higher standards for safety features. That is precisely the approach reflected in the Act, which explicitly preserves all common-law claims.

B. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved Common-Law Claims.

Despite Congress' clear language expressly preserving common-law claims, the Eleventh Circuit went on to find that petitioners' claims are *impliedly* preempted by the Coast Guard's decision not to require propeller guards on all passenger boats. *See* P.A. 24-25. This approach violates this Court's teaching in *Cipollone* that, where Congress has spoken directly and clearly on the preemption issue at stake -- as it did in the Boat Safety Act -- a court is *prohibited* from considering any doctrine of implied preemption. The seven-member majority stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

505 U.S. at 517 (quotations deleted). This approach, the Court said "is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Id.*

In *Myrick*, this Court again affirmed this principle, but clarified that an express preemption clause, standing alone, does not automatically preclude implied preemption; it only does so when it provides a "reliable indicium of congressional intent" with respect to preemption. The Court explained:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- *i.e.* supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption . . . At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

115 S. Ct. at 1488.

As if these teachings were not clear enough, *Medtronic* reiterated that there can be no resort to implied preemption in cases where -- as here -- Congress has expressly spoken on the issue of preemption:

> As in *Cipollone*, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute] means that we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law, we must nonetheless identify the domain expressly pre-empted by that language.

116 S. Ct. 2250 (citations and quotations omitted). While the members of the Court disagreed vehemently on the meaning of Congress' words, they all agreed that, since Congress had expressly stated its intent with respect to preemption, only *express* preemption analysis could be pursued.

Given these teachings, and Congress' unequivocal preservation of all common-law claims in the Boat Safety Act, the result is clear: implied preemption arguments cannot even be considered in this case. The Eleventh Circuit's holding that the Act impliedly preempts petitioners' claims was plain error on this ground alone, and should be reversed.

Respondent will undoubtedly defend the lower court's decision to reach implied preemption on the ground that the Boat Safety Act's express preemption provision is not a "reliable indicium of Congressional intent." *Cipollone*, 505 U.S. at 517. Even assuming that the Act's express preemption provision, standing alone, does not meet the *Cipollone* test, Section 4306 does *not* stand alone. Rather, as explained above, the Act's savings clause provides a reliable -- indeed, a *conclusive* -- indicium of Congress' intent to preserve *all* common-law claims. Accordingly, there is no basis for considering any implied preemption arguments here. The express preemption inquiry should be the beginning and the end of the analysis.

C. Even Assuming That Implied Preemption Analysis Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law.

Even assuming, however, that implied preemption analysis is proper in this case, there is no preemption here since petitioners' claims do not conflict with the Boat Safety Act or

with the Coast Guard's decision *not* to regulate propeller guards.[4] As *Myrick* explained, implied conflict preemption only arises when there is an "actual conflict" between federal and state law -- either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." 115 S. Ct. at 1487.

Regarding the former, as in *Myrick*, "it is not impossible for [the manufacturer] to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 1488. Once again, the bottom line in this case is that *there is no federal regulation regarding propeller guards*. As the Coast Guard has not enacted any standard either requiring or prohibiting propeller guards on boats, respondent would not run afoul of federal law by installing propeller guards on its boat engines. (Of course, jury verdicts finding it liable in this and other cases would not compel it to do any such thing, since respondent could always opt to compensate the plaintiffs for their injuries rather than avoid such suits altogether by installing propeller guards.) In any event, given the absence of any federal regulation regarding propeller guards, there can be no claim of impossibility here.

The Eleventh Circuit's contrary conclusion is once again

---

[4] As a threshold matter, the Eleventh Circuit compounded its initial error (considering implied preemption in the first place) by refusing to apply any presumption against implied conflict preemption. *See* P.A. 15. This holding is flatly wrong. To cite but one of myriad potential examples, in *Hillsborough*, 471 U.S. at 715, this Court rejected an implied preemption argument relying heavily on the presumption against preemption. This makes sense since, if the presumption against preemption is to be employed when interpreting Congress' express language, it follows logically that a court should be even more cautious in finding preemptive intent by implication from far less reliable indicators.

rooted in its erroneous "field preemption" theory. The lower court reasoned as follows: (1) the Boat Safety Act bars States from enacting *any* regulations except ones identical to federal standards; (2) the Coast Guard considered, but declined to issue, a federal standard requiring propeller guards on all boats; (3) given that the Act preempts the field of state regulation absent federal action, the Coast Guard must have intended for its regulatory *in*action to bar any state regulation governing propeller guards; and, therefore (4) it would be "impossible" for respondent to comply with both state and federal law. *See generally* P.A. 18-21. *See also* P.A. 24 ("because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed.").

This theory fails for the simple reason that Congress manifestly did *not* intend to preempt the field of boat safety when it passed the Act into law. *See supra* at 12-16. That being so, the Coast Guard had no basis for assuming or intending that its decision not to regulate propeller guards would affect the States' ability to regulate propeller guards. Moreover, as explained above, there is no evidence that the Coast Guard thought that propeller guards should be banned. To the contrary, all the agency decided was that, due to the lack of "universally acceptable" propeller guard technology suitable for all engines, it was premature to issue a nationwide standard *requiring* propeller guards on every passenger boat in the country. *See* J.A. 163. The absence of a universally appropriate propeller guard does not mean, however, that *no* propeller guard should be required on *any* boat. In any event, there is no hint in the record that the Coast Guard ever decided to immunize all boat manufacturers from liability for failing to install propeller guards on specific boats. Thus, there can be no claim that it would be impossible for respondent to comply with

both the Coast Guard's regulatory scheme and a jury verdict finding it liable in this case.

Nor can there be any serious claim that permitting lawsuits like petitioners would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes of Congress." *Myrick*, 115 S. Ct. at 1487. To again use the words of *Myrick*, "[a] finding of liability against petitioners would undermine no federal objectives or purposes with respect to [propeller guards], since none exist." *Id.* at 1488. Here, too, the absence of any federal standard regarding propeller guards is the end of the matter.

The Eleventh Circuit nonetheless held that petitioners' claims are "preempted by implication" because they would "conflict with [the Boat Safety Act's] grant of exclusive regulatory authority to the Coast Guard." J.A. 163. This "conflict," however, is based on the lower court's misunderstanding of the Act: as explained above, Congress never granted "exclusive regulatory authority" to the Coast Guard. Nor would permitting petitioners' claims "conflict with the regulatory uniformity purpose of the [Act]." *Myrick*, 115 S. Ct. at 1138. In reality, the Act has no such stated goal. And, although the legislative history references uniformity as one of Congress' goals, the Senate Report reveals that the main purpose behind the Boat Safety Act was -- as the name implies -- boat *safety*. *See* 1971 U.S.C.C.A.N. at 1333-35. A jury verdict in petitioners' favor would be perfectly consistent with -- and substantially further -- that overriding goal. Moreover, even if there was a federal regulation in place preempting state *regulation* of propeller guards, state common-law claims still would not be preempted. In any event, as the Texas Supreme Court held in *Moore*, "the savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the

concept that a state may nevertheless award tort damages for unsafe products. *Cf. Silkwood*, 464 U.S. at 256." 889 S.W.2d at 252. Thus, any claim that an alleged interest in regulatory uniformity is sufficient to trigger implied preemption of common-law claims should be rejected.

In sum, given the strong presumption against federal preemption of common-law claims, Congress' explicit preservation of common-law claims in the Boat Safety Act, and the Coast Guard's decision *not* to promulgate any federal regulation regarding propeller guards, the decision below cannot stand. Petitioners' common-law claims are not preempted.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

Leslie A. Brueckner
(Counsel of Record)
Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*
Trial Lawyers for Public Justice, P.C.

December 29, 1997

DEC 29 1997

(10)

No. 97-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATOR OF THE ESTATE OF KATHYRN C. LEWIS

Petitioners,

VS.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

RICHARD D. HAILEY, ESQ.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE*,
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae Association of Trial Lawyers
**Counsel of Record*

37pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

INTRODUCTION 4

I. CONGRESSIONAL INTENT TO PREEMPT STATE POSITIVE LAW OR REGULATION DOES NOT ORDINARILY EXTEND TO PREEMPTION OF PRODUCT LIABILITY ACTIONS. 6

A. Tort Liability Is Not Inconsistent With Federal Administrative Regulation, But Serves As a Complementary Means of Promoting Safety. 5

B. The Compensatory Function of Tort Law Serves Fundamental Rights of Access to Justice and Values of Federalism That Are Not Addressed by Administrative Regulation 12

C. Tort Liability is Evaluative and Does Not Prescribe Specific Designs, Standards or Requirements for Manufacturers. 14

D. Tort Liability Exerts Only Indirect Influence on Manufacturers, Through Market Forces, Rather than Direct Governmental Action. 18

II. THE FEDERAL BOAT SAFETY ACT DOES NOT EXPRESSLY PREEMPT PRODUCT LIABILITY CAUSES OF ACTION BROUGHT UNDER STATE LAW. 21

A. The Statute's Preemption Provision Contains No Clear Expression of Congressional Intent to Abolish Product Liability Actions Against Manufacturers of Recreational Boats and Associated Equipment. 22

B. Savings Clause Clearly Indicates Congress Did Not Intend To Preempt Product Liability Actions. 25

III THE FEDERAL BOAT SAFETY ACT DOES NOT IMPLIEDLY PREEMPT STATE TORT LIABILITY. 25

A. Tort Remedies for Personal Injury Do Not "Stand As An Obstacle" To Federal Objectives under the FBSA ..... 25.

B. Courts May Not Declare State Remedies Impliedly Preempted Where Express Preemption Provisions Provide a "Reliable Indicium" of Congressional Intent. 28

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994) 24
Burke v. Dow Chemical Co., 797 F. Supp. 1128 (E.D.N.Y. 1992) 17
California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 7, 25
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ..... 7, 15, 16 ,21, 22, 28
Cipollone v. Liggett Group, Inc., No. 90-1038, Transcript of Oral Argument (Oct. 8, 1991) 6
CSX Transp. Inc. v. Easterwood, 123 L. Ed.2d 387 (1993) 22
Doyle v. Volkswagenerk, A.G., 267 Ga. 574, 481 S.E.2d 518 (1997) *24*
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 13
Elliott v. Brunswick Corp., 903 F.2d 1505 (11th Cir.1990) 12
English v. General Electric Co., 496 U.S. 72 (1990) *20*
Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984) 11, 17
Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987) 15
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 26, 28
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) *20*
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) *8*
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) *27*
Hines v. Davidowitz, 312 U.S. 52 (1941) 26
Hunsaker v. Surgidev Corp., 818 F. Supp. 744 (M.D. Pa. 1992) 15
Larsen v. General Motors Corp., 391 F.2d 495

(8th Cir. 1968) 11
Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1977) 4
MacGillivray v, Lederle Laboratories, 667 F. Supp. 743 (D.N.M. 1987) 14
MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) 10
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12
Maryland v. Louisiana, 451 U.S. 725 (1981) 14
Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996) 7, 14, 15, 16, 23, 24
Milwaukee v. Illinois, 451 U.S. 304 (1981) 14
Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885) 13
National League of Cities v. Usery, 426 U.S. 833 (1976) 7
New York Conference of Blue Cross v. Travelers Ins., 115 S. Ct. 1671 (1995) 21
New York v. United States, 112 S. Ct. 2408 (1992) 21
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 7
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 13
Raymond v. Riegel Textile Corp, 484 F.2d 1025 (1st Cir. 1973) 11
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 13, 19, 20, 23, 28
Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) 8
Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 12
Worm v. American Cyanamid Co., 970 F.2d 1301 (4th Cir. 1993) 8

Statutes

7 U.S.C. § 136v 7
15 U.S.C. §1203 7
15 U.S.C. §1261 7
15 U.S.C. §1334 15
15 U.S.C. §1392(d) 7
21 U.S.C. §360k 7
29 U.S.C. §144(a) 21
46 U.S.C. § 4306 (West Supp. 1995) 23
46 U.S.C. §4311(g) 6
46 U.S.C.A. §4311(g) 25

Other Authorities

Adler, Robert S., and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895 (1994) 9

American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury (1991) 11

Atwell, Barbara A., *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181 (1991) 8

Ausness, Richard C., *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syr. L. Rev. 897 (1988) 19

Ausness, Richard C., *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085 (1990) 19

CCH Products Liability Reporter ¶1570 (1993) 11
Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970) 18

Corboy, Philip H., and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and*

the Theory of Implied Preemption, 15 Am. J. Trial Adv. 435 (1992) 17

H. Rep. 324, 92d Cong., 1st Sess. (1971) 22

McGovern, Francis E., *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579 (1981) 13

McGuire, E. Patrick, The Impact of Product Liability (Conference Bd. 1988) 17

Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202(1964) 13

Prosser, William L., *The Assault Upon the Citadel (Strict Liability to the Consumer)* 19

Restatement of Torts (Second) 10, 11, 14, 16, 28

Schwartz, Teresa M., *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989) 11

S. Rep. No. 248, 92d Cong., 1st Sess. (1971) 22, 25, 27

Shavell, Steven, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984) 11

Starr, Kenneth, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association (1991) 9

Tribe, Laurence H., American Constitutional Law (2d ed. 1988) 8, 29

Wade, John W., *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) 11, 18

Wolfson, Paul, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69 (1988) 8

IN THE

Supreme Court of the United States

October Term, 1997

No. 97-288

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATOR OF THE ESTATE OF KATHRYN C. LEWIS

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose real objective is immunity from any accountability. Where Congress has not provided for meaningful alternative regulation and remedies, preemption would result in failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury. One of the tenets of ATLA's mission is to preserve the right of access to justice.

SUMMARY OF ARGUMENT

In this case, and in many others, manufacturers and others subject to federal safety regulations assert preemption as a shield against product liability suits. Their argument is that tort causes of action are simply another form of regulation. Therefore, they contend, the plain meaning of express preemption of state regulation, requirements, or standards also encompasses tort remedies.

To the contrary, tort liability differs dramatically from administrative regulation and serves other important interests. Congress cannot therefore be presumed to intend preemption of state legislative and administrative regulation to include tort remedies. At the least, courtsshould find express preemption of common law causes of action only where Congress has made its intent explicit and unambiguous.

---

amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

First, courts have long viewed tort liability as not inconsistent with federal regulation, characterizing such regulations as establishing a floor, but not a ceiling, on the duty to market safe products.

Second, tort causes of action provide legal redress for injury, a fundamental right afforded by state law. It is unlikely that Congress would intend the drastic elimination of the right to seek compensation for injuries without clear indication that it so intends.

Third, tort liability, unlike regulation, does not result in imposing specific requirements or standards with respect to product design. Indeed, it imposes no legal obligation on a defendant except to compensate a particular plaintiff for the injury caused by its product. It is therefore unlikely to result in the type of conflict with federal regulation which state regulation might involve.

Fourth, although both product liability and administrative safety regulations seek to promote the safety of products, tort liability does so without direct government action. Rather, by requiring manufacturers to bear the costs of harms caused by unreasonably dangerous products, the tort system leaves decisions regarding safety to private parties responding to market forces. This Court has recognized that the indirect incentives for safety stemming from potential tort liability are not the type direct state mandates that Congress generally seeks to preempt.

The Federal Boat Safety Act, which preempts state law or regulation establishing recreational vessel standards or requirements, cannot be construed to preempt plaintiffs' cause of action. Under Georgia law, a jury in a product liability case is called upon only to determine whether the product in question is unreasonably dangerous. Although a safer alternative design is one factor to be weighed, a jury verdict would not impose any legal requirement on a manufacturer to modify its product. Congress has enacted a savings clause

which makes it unmistakably clear that product liability actions were not intended to be preempted.

The court below erred in finding that products liability actions were impliedly preempted as an "obstacle" to Congress' objective of vesting exclusive regulatory authority in the U.S. Coast Guard. Congress did not intend that regulatory authority to wholly exclude state regulation. Moreover, as this Court has held, tort liability is not inconsistent with exclusive federal regulatory authority. Courts exceed their own authority when they seek out "implied" preemption in the face of express provisions in the statute that provide a "reasonable indicium" of congressional intent.

ARGUMENT

INTRODUCTION

Congress enacted the Federal Boat Safety Act of 1971, 46 U.S.C. §§4301-4311 ["FBSA"] in response to the dismaying number of accidents associated with recreational boating. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). Among the injuries and fatalities cited by the Senate Committee on Commerce were 58 persons struck by boats or propellers in 1970 alone. *Id.* at 10.

The FBSA was designed "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards." As the court below explained, authority to "prescribe regulations establishing minimum safety standards for recreational boats." 46 U.S.C. §4302, is exercised by the United States Coast Guard, after consultation with National Boating Safety Advisory Council. *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1499 (11th Cir. 1977).

On Feb. 1, 1990, the U.S. Coast Guard announced that it would "take no regulatory action to require propeller guards,"

stating that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." The Coast Guard stated it would continue to collect and review information. *Id.*[2]

Kathryn Lewis was riding as a passenger in a recreational motor boat powered by a Brunswick outboard motor. When the boat made a sharp turn, she was thrown into the water. She was struck and killed by the spinning propeller blades.

Plaintiffs brought a product liability action under Georgia law. Specifically, plaintiffs alleged that Brunswick failed to design its motor so as to reduce the known risk of propeller blade injuries. Plaintiffs' proffered evidence that use of a protective cage over the propeller blades was a feasible means of avoiding such injuries.[3] The district court granted Brunswick's motion for summary judgment, ruling that plaintiffs' cause of action was preempted by the Federal Boat Safety Act. The Eleventh Circuit Court of Appeals affirmed.

The central premise of the Eleventh Circuit's preemption analysis is that product liability is essentially equivalent to state administrative regulations, requirements or standards for preemption purposes. Hence, in the court's view, Congress' use of the terms "law" and "regulation" in its preemption

---

[2] Following a propeller strike accident involving a houseboat, the Coast Guard received some "considerable correspondence" concerning propeller guards, concluded that the number of injuries and fatalities due to propeller strikes did not warrant mandating safety devices. 60 Fed. Reg. 25191 (May 11, 1995). A request for public comment resulted in 1,994 requests favoring rulemaking on propeller guards, with manufacturers registering their opposition. 61 Fed. Reg. 13123 (March 26, 1996). The Coast Guard continues to receive public comment on the advisability of proposed rulemaking regarding propeller guards, kill switches, neutral returns and other devices designed to minimize propeller strike accidents. 62 Fed. Reg. 44507 (Aug. 21, 1997).

[3] Propeller guards have been used on rescue boats and military landing craft which operate in situations were persons may be in the water near revolving propeller blades, as well as on passenger boats in amusement parks and on certain fishing boats. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, n.2 (11th Cir. 1990).

provision includes not only state positive law, but also "evidence[s] an intent to include common law claims." 107 F.3d at 1501. The court found that plaintiffs' cause of action was not expressly preempted, by virtue of an express savings provision, 46 U.S.C. §4311(g). *Id.* However, the court concluded that plaintiffs' action was impliedly preempted on the ground that liability would conflict with the exclusive regulatory authority vested in the Coast Guard. *Id.* at 1505.

The notion that administrative regulation and common law liability are so similar that congressional intent to preempt the former naturally encompasses intent to preempt the latter lies at the heart of many lower court decisions finding preemption of tort remedies. Amicus suggests that this proposition misapprehends the nature of tort law, particularly product liability law, and its relationship to government regulation.

I. CONGRESSIONAL INTENT TO PREEMPT STATE POSITIVE LAW OR REGULATION DOES NOT ORDINARILY EXTEND TO PREEMPTION OF PRODUCT LIABILITY ACTIONS.

Wouldn't Congress, having established a federal regulatory program for safety, and having expressly preempted additional or divergent regulation by state legislatures and administrative agencies, also intend to preempt state "regulation" through tort lawsuits? This is the central question presented in this case and in a great number of cases arising in the lower courts where regulated industries assert federal preemption as an immunity from product liability actions under state law. Indeed, it is a question this Court has asked. *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Transcript of Oral Argument at 12-14, 18-19 (Oct. 8, 1991).

The Court addressed this question in plurality opinions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and

Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996). Although the Court there marked out the proper preemption analysis, the path is perhaps not well lighted. Amicus urges the Court to address this important issue here.

Concern for safety has prompted Congress to authorize a number of federal administrative agencies to promulgate standards or requirements related to product safety. Frequently, such legislation expressly preempts state regulation, requirements, standards, or laws. *E.g.*. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1392(d); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; Federal Flammable Fabrics Act, 15 U.S.C. §1203; Federal Hazardous Substances Act, 15 U.S.C. §1261, note (b)(1)(A); Federal Food, Drug and Cosmetics Act Medical Device Amendments of 1976, 21 U.S.C. § 360k(a). Unquestionably, Congress intended to avoid subjecting regulated industries to a multiplicity of state legislative or administrative requirements. Often, neither the text of the statute nor the legislative history indicates that Congress gave substantial thought to eliminating common law remedies.

Federal preemption of state law was not intended by the drafters of the Supremacy Clause to be a problem, but a solution to potential conflicts between the national government and state government, each exercising sovereign power over its citizens. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). This Court has consistently held that preemption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for preemption). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

It would not be unreasonable for the court to require that if Congress truly intends to eliminate common law remedies, it do so in explicit and unambiguous language. After all, "Congress has long demonstrated an aptitude for expressly

barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989)[4] *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. 1993)("Congress has not failed to make such preemption clear when it desires to do so.").

A "plain statement" rule instructing courts to find preemption of state common law causes of action only where Congress has explicitly referred to them would serve to protect the role of the states in our federalist system and would prevent courts from exceeding their judicial authority.

> By declining to infer preemption in the face of congressional ambiguity, the Court is . . . requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress . . . Application of the plain statement rule thus may avoid a potential constitutional problem.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2403 (1991).

The strong presumption against preemption thus safeguards state autonomy. Laurence H. Tribe, American Constitutional Law § 6-25, at 479-80 (2d ed. 1988), quoted in *Gregory supra;* Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181, 182 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 112 (1988)("The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation.")

At the same time, as Judge Kenneth Starr has observed, the "plain statement" rule also preserves the proper role of the

---

[4] *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, *common law*, rule, or public policy")(emphasis added); Copyright Act of 1976, 17 U.S.C. §301(a)(1982)(preempting rights "under the *common law* or statutes of any State")(emphasis added).

judicial branch. "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association 48 (1991).

Nevertheless, the court of appeals here and other federal courts have "discovered" an express or implied Congressional intent to eliminate product liability actions based solely on the express preemption of state law, regulation, requirements or standards. Under this view, the plain meaning of the statutory language includes all regulation, both by positive law and by common law remedies. 107 F.3d at 1501 (citing cases); Robert S. Adler and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895, 941 (1994).

If common law causes of action can properly be viewed as simply a form of government regulation, courts might well conclude that congressional intent to preempt state legislative and administrative regulation would also encompass tort suits.

Amicus submits that such a presumption in favor of preemption of state common law actions misapprehends the purpose and function of tort law. Administrative regulation and tort liability are fundamentally different. Indeed, each relies on the strengths of the other in a complementary fashion to protect the health and safety of Americans. Amicus suggests that federal lawmakers understand this relationship and that when Congress replaces state regulators with federal regulators, it does not ordinarily intend to close the doors of state courthouses as well.

Why would Congress not intend its preemption of state regulation to include common law damage actions? It does not suffice to state that "regulation can be as effectively asserted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v.*

Garmon, 359 U.S. 236, 247 (1959).[5] "Regulation," in the broad sense of influencing private conduct, can be accomplished by such a wide variety of means that preemption of all regulation would cripple state government. The answer lies in the fact that tort liability exerts its influence in a manner that does not pose the same potential for conflict with federal regulations as state positive law. Additionally, tort remedies serve important other interests not addressed by administrative regulation.

A. Tort Liability Is Not Inconsistent With Federal Administrative Regulation, But Serves As a Complementary Means of Promoting Safety.

One reason why Congress may be presumed to intend state common law remedies to continue along side a federal administrative scheme is that the two have historically been viewed as complements of each other.

Modern product liability law is frequently traced to the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Its most prominent formulation is set forth in Restatement (Second) of Torts §402 A (1965), which has been substantially adopted by

---

[5] The Court has explained that *Garmon* was chiefly concerned with "ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). *See also English v. General Electric Co.*, 496 U.S. 72, 86-87 n.8 (1990).

It is also significant that the *Garmon* Court carefully conditioned its ouster of state law on the understanding that access to justice would be assured through alternative federal remedies. The majority opinion emphasized the fact that NLRA established a set of procedures and remedies in place of the state law remedies displaced by the Act. 359 U.S. at 243. The concurring justices cautioned that, where Congress has not provided a remedy for tortious conduct, "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring), quoting *United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 665 (1954).

at least 36 states. CCH Products Liability Reporter ¶1570 (1993). Its purpose is to provide compensation for harms caused by unreasonably dangerous products and to deter manufacturers from marketing products in a defective, unreasonably dangerous condition. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

Many federal safety regulations are also aimed at ensuring the safety of products entering the marketplace. However, administrative regulation differs from tort liability in so many areas that the plain meaning of "regulation" could not naturally encompass both. Indeed, they are often viewed as polar opposites, which nonetheless complement each other. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984).

In *Cipollone*, the Court emphasized "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. Indeed, federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965).

Based on this principle, courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984); *Raymond v. Riegel Textile Corp.* 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("National Traffic Safety Act is intended to be

supplementary of and in addition to the common law of negligence and product liability."). Previously, this was the position of the Eleventh Circuit with respect to the FBSA. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990)("a manufacturer's proof of compliance with either industry-wide practices, or even federal regulations, fails to eliminate conclusively its liability for its design of allegedly defective products.").

This Court assumes that members of Congress are familiar with common law principles or ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989). Indeed, Congress may well intend to preserve this two-pronged means of promoting safety. *See Silkwood* at 264 (Blackmun, J., dissenting)("Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.").

B. The Compensatory Function of Tort Law Serves Fundamental Rights of Access to Justice and Values of Federalism That Are Not Addressed by Administrative Regulation.

A second reason why Congress may be presumed to intend that common law actions would continue despite preemption of state administrative regulation is that Congress would not ordinarily abolish the fundamental right to a remedy for legal wrongs afforded by state law.

The FBSA, like most federal safety acts, does not provide for a private cause of action for injuries. The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). The right to a remedy is expressly guaranteed by thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964).

There is at least a substantial question whether due process limits the authority of the federal government to abolish common law remedies without providing a reasonable alternative means for redress of injury. This was left as an open question in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-88, 91-93 (1978). Justice Marshall subsequently remarked that "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

In view of the importance of this right, this Court has stated "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) quoted in *Medtronic*, 116 S. Ct. 2251. As Justice Blackmun added, "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter be left to the States." *Id.* at 264 n.7 (1984)(Blackmun, J., dissenting).

Because of the importance of the right of access to justice under state common law, courts should not presume that Congress would abolish tort remedies without careful consideration. Rather, this Court has instructed that there is a

strong "basic assumption that congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). Moreover, this presumption applies not only to the existence of federal preemption, but also to the scope of express preemption provisions. *Medtronic*, 116 S. Ct. at 2250.

C. Tort Liability is Evaluative and Does Not Prescribe Specific Designs, Standards or Requirements for Manufacturers.

Congress is also unlikely to deem tort liability as equivalent to state administrative regulation for preemption purposes because tort duties and verdicts rendered thereon do not result in imposing specific standards or requirements on regulated defendants.

Mandatory standards or requirements promulgated by an administrative agency essentially usurp the design function of the manufacturer. Based on the agency's expertise and broad investigatory powers, they represent government-approved design.

Tort duties, by contrast, are rules of general applicability. Restatement of Torts (Second) §402A, for example, provides only that a manufacturer or seller who places into the stream of commerce a product in a defective, unreasonably condition shall be liable for injuries caused by it. The law does not purport to establish any specific design or requirement for any product.

As one court points out, "[i]mposing a burden on the sale in the form of potential liability for defective design is distinguishable from a state seeking to exert actual control over the mode of manufacture or distribution of a specific product." *MacGillivray v, Lederle Laboratories*, 667 F. Supp. 743, 745 (D.N.M. 1987).

A number of courts have, however, viewed a jury verdict in a product liability case as establishing a specific design

requirement. *See, e.g., Hunsaker v. Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), *aff'd*, 5 F.3d 1489 (3d Cir. 1993)("A jury's finding of liability effectively creates a new standard or duty which defendants must follow."); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987)(A jury award "effectively compels the manufacturer to alter its warning to conform to different state law requirements as 'promulgated' by the jury's findings.). The Eleventh Circuit in this case adopted the same view. 107 F.3d at 1501.

This Court's decision in *Cipollone* has been cited for the proposition that any express preemption of state "requirements" can be deemed to include state tort causes of action. As this Court subsequently made clear, the Court's narrow interpretation of the preemption provision involved in Cipollone does not support such a blanket abolition of common law remedies. *Medtronic*, 116 S. Ct. at 2252. Moreover, lifting the Court's language out of its context violates the basic instruction in *Cipollone* that the scope of preemption is governed by the language and background of the specific statute. As the *Cipollone* opinion makes clear, the Court's determination that some common law causes of action were encompassed within the preemption of any state "requirement or prohibition" was based on clear indications of congressional intent found in the unusual text and in the legislative and regulatory context of the statute. *Cipollone*, 505 U.S. at 520-23.

The *Cipollone* plurality opinion also strongly suggests that it was Congress' use of the term "prohibition" rather than "requirement" that indicated that some common law causes of action were to be preempted. The Court held that the 1965 Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1334, which provided "No statement relating to smoking and health . . . shall be *required*" (emphasis added), preempted only state legislative and administrative regulation, not state law damage actions. *Id.* at 505 U.S. at 519. On the other hand, the Court held that the Public Health Cigarette

Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87, which provided in §5 "No *requirement or prohibition* based on smoking and health shall be imposed under State law" encompassed some common law causes of action. In view of the plurality's statement that there is "no general, inherent conflict between federal preemption of state warning *requirements* and the continued vitality of state common law damages actions," 505 U.S. at 518 (emphasis added), it seems clear that the Court viewed the words "or prohibition" as significant in expanding the preemptive scope to include tort actions. The Court further stated:

> It is in this way that the 1969 version of 5(b) differs from its predecessor: Whereas the common law would not normally *require* a vendor to use any specific statement on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative requirements or negative *prohibitions*.

Cipollone, 505 U.S. at 522 (emphasis added). In the context of that case, while a jury verdict would not require a specific design or warning, a verdict that the congressionally mandated warning constituted misrepresentation could be viewed as a prohibition. The FBSA precludes state standards or requirements, but not negative prohibitions.

The fact is that jury verdicts in product liability cases do not prescribe any specific design or safety device. Tort law does not require jurors to become design engineers. A liability verdict finds only that a defendant has breached its legal duty by marketing an unreasonably dangerous product, frequently defined as dangerous beyond the contemplation of the ordinary consumer. Restatement of Torts (Second) § 402A, comment i (1965). Neither the judge nor the jury is called upon to prescribe a safe design or proper conduct. As this court pointed out in *Medtronic*: "It will be rare indeed for a court hearing a common-law cause of action to issue a decree that has the effect of establishing a substantive requirement for a specific device." 116 S. Ct. at 2259. Indeed, amicus is not aware of any instance in which liability was accompanied

by such injunctive relief. The only "requirement" imposed upon the defendant is that it compensate the plaintiff for the harm caused.

Product liability is not equivalent to regulatory standards or requirements because a jury's verdict imposes no legal obligation with respect to the product involved. Philip H. Corboy and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 452-57 (1992). Indeed, since the jury is required to find only whether the product is defective or unreasonably dangerous, not what a reasonably safe design would require, there is no specific standard or requirement the manufacturer could adopt, even if it so desired. A manufacturer's decision not to make such a modification will not result in any legal consequence. In fact, a significant number of manufacturers who are held liable decide not to modify the product or warnings.[6] A subsequently injured plaintiff would be required to satisfy the same tort elements as the previous plaintiff. In short, the defendant is in essentially the same position as before the verdict: take reasonable precautions to minimize the risk of harm to consumers or take the chance that a consumer will be injured and a future jury will find the product unreasonably dangerous and award damages. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1138 (E.D.N.Y. 1992)(noting that *Ferebee* "remains a leading case").

Because tort actions do not result in imposing specific design standards or requirements on manufacturers, they do not pose the potential for conflict with federal standards that

---

[6]E. Patrick McGuire, The Impact of Product Liability 18 (Conference Bd. 1988)("Nearly half of the companies with actual product liability experience . . . have improved their product use and warning materials. And a third say that they have redesigned their product lines to improve safety.")(context suggests substantial overlap of these two groups).

state administrative regulations present. For this reason, Congress may well intend that state causes of action continue while state administrative regulations be preempted.

D. Tort Liability Exerts Only Indirect Influence on Manufacturers, Through Market Forces, Rather than Direct Governmental Action.

Finally, tort liability exerts its "regulatory" influence only indirectly, by providing market incentives for manufacturers to invest in safety, rather than by direct governmental commands. Congress is therefore unlikely to view tort liability as posing the same potential conflict with federal safety regulations that direct state regulation involves.

Product liability, in addition to its compensatory function, also serves to deter the marketing of unreasonably dangerous products. It does so by making the manufacturers of such products bear the costs of the harms they inflict. Restatement (Second) of Torts §402A, comment c (1965). In the absence of effective tort liability, manufacturers who invest in safety are at a competitive disadvantage with those who do not, and "bad" products may drive out the good. Forcing manufacturers to bear the cost of the harms caused by their unreasonably dangerous products allows the market to operate on the basis of the true social costs of products. To the extent that prevention of injury is cheaper than the compensation of the injured, there is an incentive for manufacturers to make their products safer. See, John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

In his classic exposition, Judge Calabresi contrasts this indirect influence exerted on the market by tort law, which he calls "general deterrence" with governmental regulatory mandates, which he labels "specific deterrence," Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970).

He points out that the market causes a manufacturer to internalize expenditures to improve safety, it does not do so

with respect to the costs of injury. Dangerous products are therefore priced artificially low. Calabresi, *supra*, at 70. In the absence of liability, the costs of accidents fall on the injured consumer, who may be covered by insurance or government programs. Nonliability is, in effect, a subsidy to the makers of unsafe products, giving them an economic advantage over producers who have invested in safety. *Id.* Product liability forces manufacturers to "internalize" the cost of harm caused by unreasonably dangerous products, so that the purchase price of a product reflects its true social cost. The manufacturer can then determine the most cost-efficient means of minimizing those costs. *See also* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1119-20 (1960); Richard C. Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085, 1140 (1990)("efficient allocation of resources is more likely if product prices reflect their actual social costs").

As one scholar summarized:

> [U]nder a general deterrence regime, manufacturers, not government officials, make decisions about product safety. . . . In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. *It is a raw exercise of state power.*

Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988)(emphasis added).

This Court's preemption decisions have long recognized the distinction between the indirect effect of tort liability on private decisionmakers and direct government regulation. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), the Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of

nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards."

As the Court later explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. . . . We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added). Shortly thereafter, the Court reaffirmed the importance of this distinction:

> [F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.
>
> This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

English v. General Electric Co., 496 U.S. 72, 85 (1990).

As Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, *supra*, at 112 S. Ct. at 2628, 505 U.S. 536-37 (Blackmun, J., concurring in part, dissenting in part).

The Court employed a similar analysis in *New York v. United States*, 112 S. Ct. 2408 (1992), finding that financial incentives to encourage states to enforce federal radioactive waste policy did not intrude upon state sovereignty protected by the Tenth Amendment. But "directly compelling them to enact and enforce a federal regulatory program" did. *Id.* at 2420. In *New York Conference of Blue Cross v. Travelers Ins.*, 115 S. Ct. 1671 (1995), the Court held that state laws which impose a surcharge on hospital bills covered by commercial insurers are not preempted by 29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The Court acknowledged that such state laws make [nonprofit insurance] "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 1679. However, "laws with only an indirect economic effect on the relative costs of various health insurance packages" do not "relate to" ERISA plans.

In the same vein, ATLA submits, product liability law which adds the cost of injuries to dangerous products, making safer products more attractive, are not state requirements.

II. THE FEDERAL BOAT SAFETY ACT DOES NOT EXPRESSLY PREEMPT PRODUCT LIABILITY CAUSES OF ACTION BROUGHT UNDER STATE LAW.

A. The Statute's Preemption Provision Contains No Clear Expression of Congressional Intent to Abolish

Product Liability Actions Against Manufacturers of Recreational Boats and Associated Equipment.

Cipollone's primary directive to federal courts is that the preemptive scope of a federal statute "is governed entirely by the express language." 505 U.S. at 518. "If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp. Inc. v. Easterwood*, 123 L. Ed.2d 387, 396 (1993). Without the lower court's unwarranted presumption that Congress' use of the terms "law" and "regulation" evince an intent to preempt tort remedies, there is no indication that Congress intended to preclude Petitioners' cause of action.

The FBSA was prompted by the dismaying number of injuries and fatalities associated with recreational boating. Prior to 1971, regulation of boating safety was scattered among several agencies, and the focus was almost exclusively on the owners and operators of vessels. Congress determined that further progress in reducing accidents would require regulation of vessel manufacturers. Both the Senate and House committees supporting the legislation cited to the numbers of boating accidents, including the substantial number of propeller strike injuries and fatalities. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971); H. Rep. 324, 92d Cong., 1st Sess. 2 & 6 (1971). The legislative history contains no expression of congressional concern that damage suits constituted a burden on manufacturers or that manufacturers should be in anyway shielded from liability.

Congress included an express preemption provision in the FBSA:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or

> imposing a requirement for associated equipment ... that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (West Supp. 1995).

Brunswick's position here is substantially similar to that urged by the manufacturers in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996): "that the plain language of the statute preempts any and all common-law claims brought by an injured plaintiff." Like Medtronic's claim, Brunswick's "is not only unpersuasive, it is implausible." *Id.* at 2251.

Like the Medical Device Amendments at issue in *Medtronic*, the Boat Safety Act provides no private right of action for injured persons. "It is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured" citing *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984). Such a construction of §4306 would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Medtronic*, 116 S. Ct. at 2251.

Section 4306 preempts only those state laws or regulations that establish a recreational vessel or associated equipment safety standard or impose a requirement for associated equipment. The general duties of tort law are not so specific. The product liability duties in this case are substantially those in *Medtronic*, where the Court stated:

> [T]the general state common-law requirements in this case were not specifically developed -with respect to- medical devices. Accordingly, they are not the kinds of requirements that Congress and the FDA feared would impede the ability of federal regulators to implement and enforce specific federal requirements. . . . These state requirements therefore escape pre-emption . . . because their generality leaves them outside the category of requirements that 360k envisioned."

116 S. Ct. at 2258.

The lower court apparently took the view that a jury verdict in favor of Petitioners would establish a specific standard or requirement. Setting aside the dubious assumption that jury verdicts fall within the ordinary meaning of "law or regulation" the court failed to identify any standard or requirement that a jury in this case might establish or impose.

The Supreme Court of Georgia has recently enunciated the requirements for making out an action for product liability for defective design. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994). The ultimate question for the jury is whether, "in choosing the particular design and cost trade-offs, the manufacturer exposed the consumer to greater risk of danger than he should have." 264 Ga. at 734. In reaching this determination, the jury may be asked to weigh a number of factors. The existence and feasibility of an alternative safer design is but one factor, albeit an important factor in many cases, for the jury to consider. *Id.* at 735. It is not, however, an essential element of the claim. *Id. See also Doyle v. Volkswagenerk, A.G.*, 267 Ga. 574, 481 S.E.2d 518, 521-23 (1997). In this case, for example, the jury may consider the availability of a propeller guard to minimize the risk of propeller strikes. Indeed, a plaintiff may suggest multiple design alternatives. But a verdict of liability would not represent a finding that such guards are the sole factor rendering the product defective.

Amicus submits that permitting plaintiffs' cause of action would not result in establishing any standard or requirement for recreational vessels and associated equipment as envisioned by the preemption provision.

B. Savings Clause Clearly Indicates Congress Did Not Intend To Preempt Product Liability Actions.

A provision added by the Senate committee provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability under common law or under State law.

46 U.S.C.A. §4311(g) (West Supp. 1995).

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) is plain. As explained by the Senate Report:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer with the *minimum standards* promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1352 (emphasis added).

III THE FEDERAL BOAT SAFETY ACT DOES NOT IMPLIEDLY PREEMPT STATE TORT LIABILITY.

A. Tort Remedies for Personal Injury Do Not "Stand As An Obstacle" To Federal Objectives under the FBSA.

Although the court of appeals determined that Congress did not expressly intend the FBSA to abolish product liability causes of action, the court nonetheless found implied preemption.

This Court has recognized implied "field" preemption, where Congress has intended to preempt an entire field exclusively, and "conflict" preemption, where it is impossible to comply with both federal and state regulations. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87 (1995). The court of appeals based its holding on a narrow category of conflict preemption in which state law is preempted where

it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id., quoted in Lewis at ___.[7]

"Obstacle" preemption originated in *Hines v. Davidowitz*, 312 U.S. 52 (1941), where Court preempted an Alien Registration Act enacted by Pennsylvania. Justice Black explained the basis for the preemption:

> [T]his legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

312 U.S. at 67-68. .

This national imperative is not present in the area of tort liability for personal injury. As Justice Marshall subsequently elaborated:

> [I]n the seminal case of *Hines v. Davidowitz*, the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as

[7]Despite the lower court's attempt to distinguish *Myrick*, the Coast Guard's failure to promulgate a requirement regarding propeller guards, like the absence of an automatic brake system standard in *Myrick* defeats the preemption argument:

> We cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. . . . NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.

514 U.S. at 289-90.

> we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985).

Even if "obstacle" preemption can properly be applied to state tort remedies, the court erred in its application here. The Eleventh Circuit stated that Petitioners' product liability claims would conflict with Congressional intent to impose regulatory uniformity by vesting exclusive regulatory authority in the Coast Guard. 107 F.3d at 1502.

It is clear, however, that Congress did not intend the Coast Guard's regulatory authority to exclude all state authority. Congress authorized the Coast Guard to develop "minimum" standards. 46 U.S.C. §4302. Moreover, the preemption provision itself exempts from preemption state law or regulation as permitted by the Secretary under 46 U.S.C. §4305.

The sole support for the court of appeals' assertion that Congress intended the Coast Guard to have exclusive rulemaking authority is a passage taken from the Senate Report. That passage, however, confirms that Congress contemplated that state authority would continue to play a role under the FBSA. The passage explains that within the preemption section:

> A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of *state authority* does not seriously impinge on the basic need for uniformity.

Sen. Rep. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1341. (emphasis added).

Moreover, the lower court's implied preemption holding is infected with the same unwarranted presumption that common law liability actions are equivalent to state regulation for purposes of preemption. This Court has previously rejected the assumption that state tort law necessarily

conflicts a grant of exclusive regulatory authority to a federal agency. For example, Congress has adopted a comprehensive regulatory scheme with respect to safety aspects of nuclear power. Nevertheless,

> Congress did not believe that it was inconsistent to vest the NRC with *exclusive regulatory authority* over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258 (1984). (emphasis added).

B. Courts May Not Declare State Remedies Impliedly Preempted Where Express Preemption Provisions Provide a "Reliable Indicium" of Congressional Intent.

This Court has instructed that where Congress has expressed its intent in statutory language addressing preemption, a court may not look to other sources for "implied" preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

While there are circumstances in which the legislative language addressing preemption does not entirely negate the possibility of implied preemption, there is, at the very least, a strong inference that an express preemption clause forecloses implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). In this case, the provisions in the FBSA expressly dealing with preemption were abundantly sufficient to provide a "reliable indicium of congressional intent." *Id.* Amicus submits that the court therefore exceeded its authority by engaging in a search for implied preemption.

This is not a reluctance to defer to congressional prerogative. On the contrary, as one commentator states:

> When the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Laurence H. Tribe, American Constitutional Law §6-25, at 483 n.8 (2d ed. 1988).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals below.

Respectfully submitted,

JEFFREY ROBERT WHITE, ESQ.
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae
The Association of Trial Lawyers of America

December 29, 1997

No. 97-288

Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR., ETC.,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

David M. Heilbron
Leslie G. Landau
McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

Thomas A. Ziolkowski
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

Kenneth W. Starr
Counsel of Record
Paul T. Cappuccio
Richard A. Cordray
Brett M. Kavanaugh
KIRKLAND & ELLIS
655 Fifteenth Street N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Amicus Curiae General Motors Corporation

BEST AVAILABLE COPY

37 pp

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT 6

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE 10

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE 19

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **Page**

American Airlines v. Wolens,
513 U.S. 219 (1995) 24-25
Asahi Metal Indus. Co. v. Superior Ct.,
480 U.S. 102 (1987) 15
Beatty v. Trailmaster Prods.,
625 A.2d 1005 (Md. 1993) 23
BMW of N. Am., Inc. v. Gore,
116 S. Ct. 1589 (1996) 16
Brooks v. Beech Aircraft Corp.,
902 P.2d 54 (N.M. 1995) 22-23
Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union,
468 U.S. 491 (1984) 27
CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) ..... *passim*
Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 29
Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) ..... *passim*
Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 4, 18, 19
Free v. Bland,
369 U.S. 663 (1962) 27
Freightliner Corp. v. *Myrick*,
514 U.S. 280 (1995) 5, 7, 26
International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 6, 7, 28
Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 15
Marks v. United States,
430 U.S. 188 (1977) 14-15

CASES - Continued: **Page**

Medtronic, Inc. v. Lohr,
116 S. Ct. 2240 (1996) ..... *passim*
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 5, 24
New York Times v. Sullivan,
376 U.S. 254 (1964) 18
Pennsylvania R.R. v. Puritan Coal Mining Co.,
237 U.S. 121 (1915) 24, 25
Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 5, 25
Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 6, 25, 29, 30
San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,
359 U.S. 236 (1959) 16
Sheehan v. Cincinnati Shaper Co.,
555 A.2d 1352 (Pa. Super. 1989) 23
South Dakota v. Yankton Sioux Tribe,
No. 96-1581,
slip op. at 17 (U.S. Jan. 26, 1998) 25
Swift v. Tyson,
41 U.S. (16 Pet.) 1 (1842) 19
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 6, 28
United Gas Improvement Co. v. Continental Oil Co.,
381 U.S. 392 (1965) 15
Wagner v. Clark Equip. Co.,
700 A.2d 38 (Conn. 1997) 22

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. art. VI, cl. 2 ..... 18, 27
The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994) *passim*
Federal Cigarette Labeling and Advertising Act,
79 Stat. 282 (1965) 12

STATUTES - Continued: **Page**

Federal Railroad Safety Act of 1970, 84 Stat. 971 13
Medical Device Amendments of 1976, 90 Stat. 539 14
National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) 1, 2, 7
Public Health Cigarette Smoking Act of 1969, 84 Stat. 87 ..... 12, 13
Rules of Decision Act, 28 U.S.C. § 1652 ..... 18, 19
15 U.S.C. § 1334(b) 12
21 U.S.C. § 360k(a) 14
45 U.S.C. § 434 13
Kan. Stat. Ann. § 60-3304(a) (1996) 22
Mich. Comp. L. Ann. § 600.2946(4) (West 1997) 22
33 C.F.R. Pts. 175, 177, 181, 183 (1997) 9,29
36 Fed. Reg. 15,764-65 (Aug. 11, 1971) 8, 9
37 Fed. Reg. 15,777-85 (Aug. 4, 1972) 9
38 Fed. Reg. 71 (Dec. 27, 1972) 9
38 Fed. Reg. 6914-15 (Mar. 8, 1973) 9, 10
S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 8,22,23

MISCELLANEOUS:

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales v. TWA*, (No. 90-1604) 24, 25
Guido Calabresi, *A Common Law for the Age of Statutes* (1982) 17
Melvin Eisenberg, *The Nature of the Common Law*, (1988) 17
Restatement (Third) of Torts: Products Liability § 4, cmt. (proposed final draft Apr. 1, 1997) 22
Transcript of Oral Argument, *Medtronic, Inc. v. Lohr* (No. 95-754) 15

No. 97-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR., ETC.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.[1]

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states

---

[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local

conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an *ad hoc* collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311(g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic*, 116 S. Ct. at 2259 (plurality opinion) (implied-

conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX*, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain

exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra*.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority

conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision

operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.[2]

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

---

[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case.[3]

---

[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic*, *CSX*, and *Cipollone* when discussing this point. *See* Petrs. Br. 24-28.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement"

---

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the

---

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety

(continued...)

issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259

---

[6](...continued)
hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

(Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic*.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in

---

[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually

codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g., Medtronic*, 116

---

[8] The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18-19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant*. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of

decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic*, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision

establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or

a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense,

and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with . . . this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a

---

[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, *see, e.g.*, *Beatty v. Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

complete "anti-preemption" clause, and *all* state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic*, the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act.

> *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe*, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales*, 504 U.S. at 384)).[10]

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

---

[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." *See id.* at 21; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone*, *see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX*, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick*, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit*.

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption

analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX*, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic*, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.*, 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick*, 514 U.S. at 289). The statute at issue in *Medtronic*, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501

(1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.[11]

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption.[12] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted

---

[11] Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Cipollone*, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

[12] The Solicitor General also appears to accept this proposition, for he states that "[u]nder our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act.[13] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).[14]

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that

---

[13] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

[14] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 28-29 & n.19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183.

requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

DAVID M. HEILBRON
LESLIE G. LANDAU
McCUTCHEN, DOYLE,
BROWN & ENERSEN, LLP
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

KENNETH W. STARR
Counsel of Record
PAUL T. CAPPUCCIO
RICHARD A. CORDRAY
BRETT M. KAVANAUGH
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000

THOMAS A. ZIOLKOWSKI
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

Attorneys for Amicus Curiae General Motors Corporation

January 28, 1998

Supreme Court, U.S.
FILED
JAN 28 1998

No. 97-288

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VICKY LEWIS, *et al.*,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

DANIEL J. POPEO
(Counsel of Record)
DAVID M. YOUNG
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: January 28, 1998 *Attorneys for Amicus Curiae*

BEST AVAILABLE COPY

31 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. CONGRESS INTENDED TO CREATE UNIFORM NATIONAL STANDARDS FOR SAFE BOAT DESIGN AND MANUFACTURE . 6

II. CONGRESS ENACTED THE FBSA TO REGULATE A FIELD IN WHICH THERE IS A DOMINANT FEDERAL INTEREST 9

III. IT WAS NOT NECESSARY FOR THE COAST GUARD TO FOLLOW THE ADMINISTRATIVE PROCEDURES ACT IN ORDER FOR ITS DECISION NOT TO REGULATE TO HAVE PREEMPTIVE EFFECT 17

IV. A COMMON LAW IMPOSITION OF LIABILITY WOULD BE NO LESS DAMAGING TO FEDERAL UNIFORMITY THAN A STATE STATUTORY OR ADMINISTRATIVE REQUIREMENT 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases:

Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 17
Atkinson v. Gates, McDonald & Co., 838 F.2d 808 (5th Cir. 1988) 15
Barnard v. Zapata Haynie Corp., 975 F.2d 919 (1st Cir. 1992) 15
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) 11
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) 11
Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 11
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 5,21,22
East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 10
English v. General Electric Co., 496 U.S. 72 (1990) 7
Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988) 15,16
Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) 10
Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S.Ct. 1483 (1995) 19,20
Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942) 10
Hetzel v. Bethlehem Steel Corp., 50 F.3d 360 (5th Cir. 1995) 16

Hines v. Davidowitz,
312 U.S. 52 (1941) 11
Ingersoll-Rand Co. v. McClendon,
498 U.S. 132 (1990) 7
Maryland Dep't of Natural Resources v. Kellum,
51 F.3d 1220 (4th Cir. 1995) 16
Medtronic, Inc. v. Lohr,
___ U.S. ___, 116 S.Ct. 2240 (1996) 22
Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 10,11
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 8
Napier v. Atlantic Coast Line R.R.. Co.,
272 U.S. 605 (1926) 11
New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 22
Norfolk & Western R. Co. v. Train Dispatchers,
499 U.S. 117 (1991) 23
Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 17,20
Romero v. Int'l Terminal Operating Co.,
358 U.S. 354 (1959) 10
Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988) 7
Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 8
Sisson v. Ruby,
497 U.S. 358 (1990) 10
Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310 (1955) 10
Yamaha Motor Corp., U.S.A. v. Calhoun,
___ U.S. ___, 116 S.Ct. 619 (1996) 16

Constitution and Statutes:

46 U.S.C. § 4306 . . . . . *passim*
46 U.S.C. § 4311(g) 8
46 U.S.C. § 13110 19

U.S. CONST., Art. VI, cl. 2 6

Legislative Materials:

Senate Rep. No. 248, 92d Cong., 1st Sess. (1971),
reprinted in 1971 U.S.C.C.A.N. 1333 . . 9,11,12,13

Other Authorities:

Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) 21

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-288

VICKY LEWIS, *et al.*,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF regularly appears before federal and

---

[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole

(continued...)

state courts to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in cases involving federal preemption issues, arguing that the American economy suffers when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240 (1996). Also, WLF's Legal Studies Division has published papers on federal preemption and related topics. *See, e.g.*, Paul LeRoy Crist, *Federal Preemption of State Tort Claims After Medtronic, Inc. v. Lohr* (WLF WORKING PAPER January 1997). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of both parties. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement of the Case in respondent's brief.

In brief, this case arises from a tragic accident in which petitioners' daughter "fell or was thrown" from a boat in which she was riding on Strom Thurmond Lake in Georgia. Pet. App. A3. The decedent died from injuries resulting from being struck in the head and body by the propeller of

---

[1](...continued)
or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

the boat's engine. *Id.* at A3-A4. The engine was designed and manufactured by respondent; it was not equipped with a propeller guard. *Id.*

Petitioners filed suit against respondent in Georgia state court, alleging that the lack of a propeller guard made the engine a defective product. Pet. App. 4A. Respondent removed the case to federal court, and the federal district court granted respondent's motion for summary judgment on petitioners' state tort law claims, holding that the claims were preempted by the Federal Boat Safety Act ("FBSA"), 46 U.S.C. §§ 4301, *et seq*. *Id.* The United States Court of Appeals for the Eleventh Circuit affirmed, holding that while petitioners' common law claims were not expressly preempted by § 4306 of the FBSA because of the Act's "savings clause" in § 4311(g), those claims were impliedly preempted because "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [FBSA]." Pet. App. A22. The Eleventh Circuit found that, after extensive public investigation, the Coast Guard concluded that propeller guards should not be required on recreational boats; in fact, such a requirement might create additional hazards to boaters.

SUMMARY OF ARGUMENT

This case presents an important question concerning Congress' ability to promote uniform rules for the design and manufacture of products, in this case, boats, free from widely disparate state common law requirements. The issue has special significance in this case, which concerns congressional action in an area in which the federal interest dominates. This Court has long recognized the dominant

federal interest in matters of admiralty and maritime law, and the Congress specifically invoked the admiralty and maritime jurisdiction when enacting the FBSA, citing traditional concerns for the need for uniform rules of conduct in order to promote commerce.

In any field, however, the touchstone for analysis of preemption must be Congress' intent, and in enacting the FBSA, Congress intended to create uniform national standards for safe boat design and manufacture. Thus, the FBSA broadly preempts any state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

A propeller guard is associated equipment, and the Coast Guard has most decidedly not promulgated any regulation identical to the common law liability petitioners would have the state court impose on respondent. To the contrary, the Coast Guard has declined to require propeller guards, in part based on the possibility that such a requirement could actually increase dangers to boaters. To the extent the FBSA contemplates a continued role for states in boat safety, that role is state participation and coordination in boat safety programs, the imposition of requirements for carrying or using marine safety articles to meet uniquely hazardous local conditions, and regulation concerning safe boat operation and use. Congress did not intend to allow fifty different states using lay juries to establish differing standards for boat design and manufacture.

Further, it is no obstacle to preemption that the Coast Guard's decision not to require propeller guards was not made in the context of an Administrative Procedures Act ("APA") rulemaking. The FBSA preempts any state law or requirement which is not identical to a Coast Guard regulation under the FBSA, and if the Coast Guard has not imposed a regulation, the state requirement cannot be identical. It simply does not matter that the Coast Guard did not perform an APA rulemaking in order to refrain from regulating. Moreover, the APA was intended to allow potentially burdened parties to have input into the development of regulations which could be imposed upon them, and to ensure that the relevant agency fully considers the impact of proposed regulation before imposing government regulation on an activity. An agency is not required to follow the APA simply in order to justify the continued operation of the free market, *i.e.*, in order to decide to *refrain* from regulation.

This Court should likewise reject petitioners' contention that, for preemption purposes, state common law claims operate differently than state statutory or administrative enactments and therefore should not be preempted. This Court's plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) rejects this contention. A common law damages claim can have every bit as much of an effect on altering design and manufacturing standards as would a state statute or regulation. This is particularly true considering that a common law action could result in a punitive damage award against a manufacturer, particularly if a manufacturer failed to alter its conduct after a prior judgment against it. Petitioners' economic analysis of state common law liability also fails to consider the impact of having numerous differing standards of liability across fifty

states. Thus, state common law liability presents a potential obstacle to federal uniformity just as much as would state statutes or regulations.

ARGUMENT

I. CONGRESS INTENDED TO CREATE UNIFORM NATIONAL STANDARDS FOR SAFE BOAT DESIGN AND MANUFACTURE

Petitioners and their supporting *amici* argue repeatedly that a finding of preemption in this case is inappropriate due to the "strong" presumption against preemption. *See, e.g.*, Brf. of Pet. at 16, 23; Am. Brf. of Association of Trial Lawyers of America ("ATLA") at 8. Petitioners and their *amici* have misconstrued the nature of the "presumption" that exists in preemption cases. Any such preemption is merely a tool to be used in deciding the ultimate issue in this case: did Congress intend to preempt product liability actions of the type brought by petitioners? Presumptions regarding congressional intent are relied upon only in the absence of more direct evidence of that intent. As discussed *infra*, the language of the FBSA as well as other traditional indicia of congressional intent make clear that Congress fully intended to preempt this type of action. Accordingly, the "presumption against preemption" cited by petitioners is irrelevant in this case.

State governments unquestionably have an important role to play in our federal system of government. Nevertheless, there can be no dispute that, ultimately -- under the Supremacy Clause, U.S. Const., art VI, cl. 2 -- it is for the national government to decide how large a role the states are to play in any given issue. The national

government is free to go so far as to preempt all state jurisdiction over an issue, so long as its actions are consistent with the Tenth Amendment.

Whether the national government has preempted all state jurisdiction over a given issue "fundamentally is a question of congressional intent." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In discerning congressional intent, the starting point is the language of the statute at issue; "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English*, 496 U.S. at 79. Courts may also look to the "structure and purpose of the statute" in discerning congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 132, 138 (1990).

The broad preemptive language of the FBSA indicates that Congress intended to preempt some forms of state regulation of boat design and manufacture. The FBSA provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances

within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Petitioners contend, nonetheless, that in light of the "presumption against preemption," the FBSA's preemption provision should be given the narrowest construction that could plausibly be squared with the statutory language. Thus, petitioners go so far as to suggest that the preemption provision should not be interpreted as applying to state regulation in the form of common law tort actions because the statutory language refers to "law or regulation," "safety standard," or "requirement for associated equipment," but does not explicitly state "common law". This argument runs counter to normal canons of statutory interpretation. Words in a statute are to be given their ordinary meaning. If Congress intended, as demonstrated by its statutory language, that a preemption provision is to be broad in scope, it is not for the courts to override that intent by resort to a contrary "presumption." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (preempting state fare-advertising regulations); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (preempting state laws relating to any employee benefit plan).

To the extent the FBSA saves state law claims,[2] the statute is best construed as saving state law claims based on violation of those state law requirements which the FBSA specifically contemplated would remain viable, such as those

---

[2] *See* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, requirements, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.").

concerning the carrying or use of marine safety articles, or those directed at safe boat operation and use. *See* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1331 (discussing Section 10). In the alternative, the FBSA could be construed as the Eleventh Circuit construed it in this case, saving only state law claims based on the negligent or defective design or installation of products required by the Coast Guard or provided voluntarily by manufacturers. To read the savings clause as petitioners suggest would render the FBSA's preemption clause a nullity.

In sum, there is no reason for this Court to resort to "presumptions" in interpreting the FBSA. If one gives the words of the FBSA their ordinary meaning, Congress's intent to preempt petitioners' state law cause of action is clear.

II. CONGRESS ENACTED THE FBSA TO REGULATE A FIELD IN WHICH THERE IS A DOMINANT FEDERAL INTEREST

Petitioners' reliance on a "strong presumption against preemption" is even more inappropriate in a case such as this where the legislative subject matter implicates a dominating federal interest. Thus, to the extent this Court needs to look to the structure and purpose of the FBSA to determine its preemptive scope, federal preemption applies with special force in this case because Congress enacted the FBSA to further the preeminent federal interest in providing uniform rules of conduct in the field of admiralty and maritime law.

Petitioners and their *amici* significantly understate the strong federal interest in this field, which has traditionally been a matter of federal law. *See, e.g.*, Am. Brf. of Trial Lawyers for Public Justice, P.C. ("TLPJ") at 14 (suggesting FBSA regulates "safety," a field traditionally regulated by state and local authorities). In this respect, it is clear that Congress in enacting the FBSA was not legislating concerning the matter of safety generally, or even product design and manufacture generally, but rather in the specific field of *boat* safety, a matter well within Congress's constitutional grant of authority in the field of admiralty law. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 361 (1959) (constitutional grant of admiralty and maritime jurisdiction empowered Congress to revise and supplement maritime law within the limits of the Constitution); *see also Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (federal admiralty jurisdiction extends to tort claims emanating from fire caused by pleasure boat docked at marina); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (federal admiralty jurisdiction applies to products liability claims concerning vessel component which causes injury to things other than the product itself); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982) (federal admiralty jurisdiction extends to collision of two pleasure boats). Even judge-made general maritime law is supreme to state statutory and decisional law within this field. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955); *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239 (1942).[3]

---

[3] It should also be noted that where there is a conflict between federal statutory law and judicially-created general maritime law, *i.e.*, "horizontal preemption", statutory law prevails. *Miles v. Apex Marine* (continued...)

Thus, this is a case where congressional intent to preempt state law may be inferred from a "dominant federal interest" in the field. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (state intellectual property action preempted despite absence of federal regulation in field because of dominating federal interest evidenced by congressional enactment of patent laws); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988) (implying intent to preempt field based on uniquely federal interest in liability of independent contractors performing work for federal government); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774-775 (1947) (failure of NLRB to entertain certain actions constituted determination by Board that certain units were not appropriate for bargaining purposes); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (implying intent to preempt field concerning obligations on aliens from dominating federal interest in foreign affairs); *Napier v. Atlantic Coast Line R.R.. Co.*, 272 U.S. 605, 613 (1926) (preempting state positive law because federal statute occupied field, although agency had not yet exercised its authority to full extent conferred).

It cannot be seriously questioned that Congress intended to invoke its power to legislative in this field, and by so doing to promote uniform rules for safety in boat design. Senate Report at 17 ("[g]eneral jurisdictional applicability is to vessels within the historic federal maritime jurisdiction .

---

[3](...continued)
Corp., 498 U.S. 19, 24 (1990). Thus, in a case such as this where Congress has enacted legislation within its power under the constitutional grant of admiralty and maritime jurisdiction, it presents the strongest case for preemption of state law.

. . ."). In explaining the federal preemption provision of the FBSA, the Senate Report explained:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

Id. at 20.

It is correct, as petitioners and their *amici* contend, that Congress intended a coordinated approach between the federal and state governments. However, the Senate Report on the FBSA makes clear that state participation in boat safety efforts was to be accomplished, not through fifty separate regulatory schemes, but rather through federal grant-in-aid incentive payments to states with state boating safety programs. Senate Report at Section 2 ("[t]his [policy and purpose] is to be done by encouraging and assisting participation by the States, the boating industry and the boating public to develop more comprehensive safety programs, [and] by authorizing the establishment of *national* construction and performance standards . . . .") (emphasis added).

The Senate Report's explanation of Section 10 of the FBSA, concerning preemption, further explains that state law was not to be completely displaced with respect to "serious hazards which are unique to a particular locale and

which would justify variances with respect to carrying or using marine safety articles . . ." or with respect to " . . . safe boat operation and use . . . ."). Such concerns do not suggest that states may continue to impose boat safety design and manufacture requirements in the face of a Coast Guard determination that a particular requirement would be unwise. To the contrary, the FBSA specifically precludes such "law or regulation," "safety standard," or "requirement for associated equipment," which is not identical to a Coast Guard requirement. 46 U.S.C. § 4306.

Moreover, it is not a complete statement of the congressional purpose to suggest that the FBSA represents an effort to promote safety to the exclusion of all other congressional interests. As with any legislation, be it boat safety, civil rights, or medical device regulation, the FBSA represents an attempt by Congress to balance safety against other competing interests, in this case, consumer choice, the need for uniformity of rules of conduct, and the promotion of maritime and interstate commerce. *See* Senate Report at 14 ("[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."); *id.* at Section 5 (" . . . the requirement . . . that standards be 'reasonable', necessarily also involves a consideration of technical feasibility and cost. Similarly, it is intended that the Secretary will consider the desirability of affording consumers a continued wide range of choice as to types of vessels and thus that standards may differ with respect to different types of vessels . . . .").

Thus, Congress sought to achieve uniformity in *rules* of safe boat design, and not uniformity in boats, as petitioners

and their *amici* appear to contend. Further, it is approaching folly to propose that such uniformity in rules of conduct will be achieved by allowing fifty different states to use juries to determine boat safety standards. *See* Pet. Brf. at 15 (proposing that common law liability would promote uniformity because "manufacturers [now] have the unregulated ability to build protective devices of all shapes, sizes, materials and designs, or to provide none at all.") In essence, petitioners' argument in this respect resembles a "big bang" theory of rulemaking, in which it is hoped that a multistate explosion of common law suits against boat manufacturers will result in an orderly universe of boat safety law and an appropriately-balanced uniform rule which all manufacturers may [indeed, must] follow. Given Congress's clear intent to achieve a uniform scheme of regulation, as opposed to uniformity of boat design, this Court should reject petitioners' argument.

Lower courts dealing with statutory admiralty preemption have consistently recognized the strong federal interest in precluding state law claims which would impede uniformity of rules of conduct. For example, the Fifth Circuit has held that:

> In these circumstances, the LHWCA [Longshore and Harbor Workers' Compensation Act] is plainly preemptive of any state law claim for intentional or bad faith wrongful refusal to pay benefits due under the Act, and this is true even in the absence of any expressly preemptive language. As the Supreme Court stated in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 151, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982), "Absent explicit preemptive language,

> Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it' . . . or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'" Moreover, "[e]ven where Congress has not completely displaced state regulation in a specific areas, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises . . . when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* In order to find such an actual conflict for this latter purpose, it is not necessary that compliance with both state and federal law be impossible. *Id.* at 3022-23.

Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 812 (5th Cir. 1988); *accord Barnard v. Zapata Haynie Corp.*, 975 F.2d 919 (1st Cir. 1992).

The Fifth Circuit has therefore concluded that:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 316-17 (5th Cir. 1987) (citation omitted), *rev'd on other grounds*, 486 U.S. 140 (1988), *on remand*, 849 F.2d 910 (5th Cir. 1988); *see also State of Maryland Dep't of Natural Resources v. Kellum*, 51 F.3d 1220 (4th Cir. 1995) (general maritime law of negligence preempts state statute imposing strict liability for damages to oyster bars); *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360 (5th Cir. 1995) (LHWCA preempts claim under Texas Deceptive Trade Practices Act).

This Court's recent decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, ___ U.S. ___, 116 S.Ct. 619 (1996), does not compel a different analysis in the context of this case. In *Yamaha*, this Court considered whether the general maritime law of wrongful death preempted state wrongful death and survival statutes in the case of a twelve-year old girl killed in a jet ski accident in state waters. As contrasted with this case, in *Yamaha* there was no federal statute which explicitly preempted state law claims; instead, the Court considered the preemptive effect of its own decisions under the general maritime law.

Owing in large part to the historical development of the maritime wrongful death remedy, which resulted in courts allowing state wrongful death statutes to supplement federal maritime law, this Court held that state statutes were not preempted by general maritime law in a case involving a non-seaman injured in state waters. *Id.* at 621-22. Moreover, the Court's ruling was carefully limited to the availability of certain types of damages; the Court specifically reserved judgment on whether state law could provide the standards governing liability. *Id.* at 629 n.14.

In sum, to the extent this Court needs to consider the structure and purpose of the FBSA to interpret its preemptive scope, Congress's desire for a uniform federal scheme of regulation dictates that petitioners' common law claims are preempted. Moreover, the dominant federal interest in admiralty and maritime law militates against any "strong presumption against preemption."

III. IT WAS NOT NECESSARY FOR THE COAST GUARD TO FOLLOW THE ADMINISTRATIVE PROCEDURES ACT IN ORDER FOR ITS DECISION NOT TO REGULATE TO HAVE PREEMPTIVE EFFECT

The Eleventh Circuit correctly held that even if petitioners' common law claims were not expressly preempted by the FBSA, those claims were impliedly preempted. This Court has stated that, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original). Thus, a decision not to regulate will have preemptive effect "where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (citations omitted).

In this light, it is no answer to suggest that the Coast Guard's decision not to require propeller guards has no preemptive effect because its non-regulation did not take the

form of a rule adopted through the procedures of the Administrative Procedures Act. *See generally* Am. Brf. of National Conference of State Legislatures, et al. It was not necessary for the Coast Guard to have affirmatively prohibited propeller guards in order for its decision to have preemptive effect. Indeed, the Coast Guard determined that the interests of boat safety and uniform regulation were best served not by either prohibiting propeller guards or requiring them, but rather by continuing to allow consumer choice and product development to take its course through the free market.

The Coast Guard's decision that a propeller guard requirement was not wise is no less preemptive than if it had issued a regulation prohibiting propeller guards, or allowing some types of propeller guards but not others, because the FBSA preempts any state "law or regulation," "safety standard," or "requirement for associated equipment," which is "not identical to" a Coast Guard regulation under the FBSA. 46 U.S.C. § 4306. Certainly, where the Coast Guard has determined that requiring propellers would be unnecessary or unwise, a state common law requirement of a propeller guard cannot be deemed identical to a non-existent Coast Guard regulation. Using analogous reasoning, the Coast Guard has historically interpreted the FBSA to preempt state positive laws and regulations, but not state common law, even when there is no counterpart federal regulation in effect. *See* Am. Brf. of United States at 14-15 n.7.

It would be a strange creature of administrative law if the Coast Guard were required to go through all the steps of an APA rulemaking simply to allow the free market to take its course without the intrusion of government regulation or

state law. The purpose of the APA is to allow public input and thorough consideration of regulatory proposals which would alter the status quo by burdening some individual or business sector with government regulation; the purpose is decidedly not to require the free market to justify its continued existence.

The character of the Coast Guard's decision not to require propeller guards only serves to underscore why a non-identical state requirement is preempted. Based on the findings of the National Boating Safety Advisory Council, which is composed two-thirds by recreational boaters, the general public, and representatives of State boating safety programs, *see* 46 U.S.C. § 13110(b)(1)(A)-(C), the Coast Guard found that a propeller requirement was not simply unnecessary but would be unwise. Indeed, the Board heard extensive evidence that a propeller requirement could increase possible dangers to boaters. Thus, the Eleventh Circuit concluded that the scientific data counseled against any regulation requiring propeller guards.

This Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483 (1995), upon which petitioners rely, is readily distinguishable. In that case, this Court concluded that common law claims based on the failure to install antilock brakes were not preempted by the Vehicle Safety Act. However, in *Freightliner*, the relevant agency had indicated its intention to regulate braking systems by promulgating a regulation requiring installation of antilock brakes, but that regulation was struck down. The defendants argued that the absence of a regulation preempted state law claims, but this Court held that there was no preemption where there was "no evidence that [the agency] decided that [the product] should be free from all

state regulation." *Id.* at 1487. Of course, in this case, there is such evidence, specifically, a considered determination by the Coast Guard that a propeller guard requirement would be both unnecessary and unwise.

Further, unlike the FBSA, the Vehicle Safety Act evinced no intent to grant the relevant federal agency exclusive authority to issue safety standards. *Id.* at 1487. To the contrary, the Vehicle Safety Act's preemption clause implied that states could impose safety standards until the federal government imposed a different standard; because the federal standard was struck down, states could continue to impose common law requirements. *Id.* at 1487-88. The Court in *Freightliner* specifically distinguished and preserved *Atlantic Richfield* as a case where the lack of regulation resulted from an affirmative agency decision to refrain from regulation. *Id.* at 1487.

The Congress's intent that any non-identical state "law or regulation," "safety standard," or "requirement for associated equipment," be preempted did not require the Coast Guard to pursue an APA rulemaking in order to refrain from regulating. Even if the Coast Guard was required to make an affirmative agency decision in order for its decision to have preemptive effect, the Coast Guard did so when, heeding the recommendations of the Advisory Council, it declined to require propeller guards.

IV. A COMMON LAW IMPOSITION OF LIABILITY WOULD BE NO LESS DAMAGING TO FEDERAL UNIFORMITY THAN A STATE STATUTORY OR ADMINISTRATIVE REQUIREMENT

The common law claims petitioners seek to advance are no less intrusive on a uniform scheme of federal regulation than would be a state statutory or administrative requirement of a propeller guard. The imposition of a duty on manufacturers to provide propeller guards is, at least for purposes of preemption analysis, every bit as much of an imposition as if it had been imposed by state statute or regulation, and has the same negative impact on a uniform federal scheme. Petitioners' *amici* attempt to suggest a distinction based upon the notion that a manufacturer may simply elect to pay a common law judgment and continue to manufacture boats without providing propeller guards, but this is no answer. It could just as well be said that a manufacturer might pay a civil statutory penalty or administrative fine without changing its conduct as a "cost of doing business." Further, petitioners' argument ignores the potential for a punitive damage award under common law, and the possibility that the likelihood of such an award would be enhanced if a manufacturer chose to ignore previous judgments against it for failing to provide a propeller guard. The prospect of compensatory and punitive damage awards will operate to destroy the uniformity of federal regulation dictated by the FBSA. *See* Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 137 (1982) (" . . . ordinary civil damages -- in the course of providing compensation -- concurrently function to deter.").

This Court's plurality opinion in *Cipollone* specifically recognized that "[state] regulation can be as effectively asserted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone*, 505 U.S. at 521 (citation omitted); *see also Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240, 2259 (1996) ("[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law.") (Breyer, J., concurring); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (civil common law action implicates state action sufficient to trigger First Amendment scrutiny; "[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised.").

Justice Breyer's concurring opinion in *Medtronic* appropriately pointed out the anomalous result of holding that a federal regulation preempts a differing state regulation but not a state tort law action premising liability on the failure to follow the state regulation. "The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic*, ___ U.S. at ___, 116 S.Ct. at 2259 (Breyer, J., concurring). Utilizing similar reasoning, this Court in *Cipollone* ruled that common law damage actions are premised on the existence of a legal duty which could constitute a "requirement or prohibition" within the meaning of a federal statute providing for preemption. *Cipollone*, 505 U.S. at 522; *see*

also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 128 (1991) (phrase "all other law, including State and municipal law" does not "admit of [a] distinction . . . between positive enactments and common-law rules of liability.").

Moreover, the economic arguments presented by petitioners' *amici* fail to take into account the full cost of a disparate scheme of multistate regulation. *See, e.g.*, Am. Brf. of United States at 23 n.14; Am. Brf. of TLPJ at 23, 27. Petitioners' *amici* suggest that a common law judgment merely requires a defendant to pay for the consequences of its conduct and that this will result in the proper level of care; however, if the standard of liability at common law varies from one state to the next, the effect will be the same as if each state enacted a differing regulatory standard.

A defendant engaged in interstate sales would have to either: 1) adhere to the most rigorous requirement imposed by any state in order to avoid paying any judgments; 2) adhere to some middle ground requirement while paying judgments for its conduct in some states while that same conduct would be deemed lawful in others; or 3) sell different products in different states, no doubt causing product costs to rise. To the extent manufacturers opt to protect themselves from judgments (for example, by providing propeller guards) even though some states would not impose liability, consumer choice is stifled. Petitioners do not appear to recognize this part of the equation, viewing as they do all safety regulation as good and non-regulation as bad. This case presents a telling example why this viewpoint is short-sighted, because the Coast Guard found that propeller guards could *increase* the risk of accidents if required of all manufacturers.

This Court should not use flawed economic analysis to infer that Congress did not mean what it said when it preempted any non-identical state "law or regulation," "safety standard," or "requirement for associated equipment." A common sense construction of the FBSA's ordinary meaning dictates that petitioners' common law tort claims based on the respondent's failure to provide a propeller guard are preempted.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully urges the Court to affirm the Eleventh Circuit's ruling below.

Respectfully submitted,

DANIEL J. POPEO
(Counsel of Record)
DAVID M. YOUNG
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: January 28, 1998 *Attorneys for Amicus Curiae*